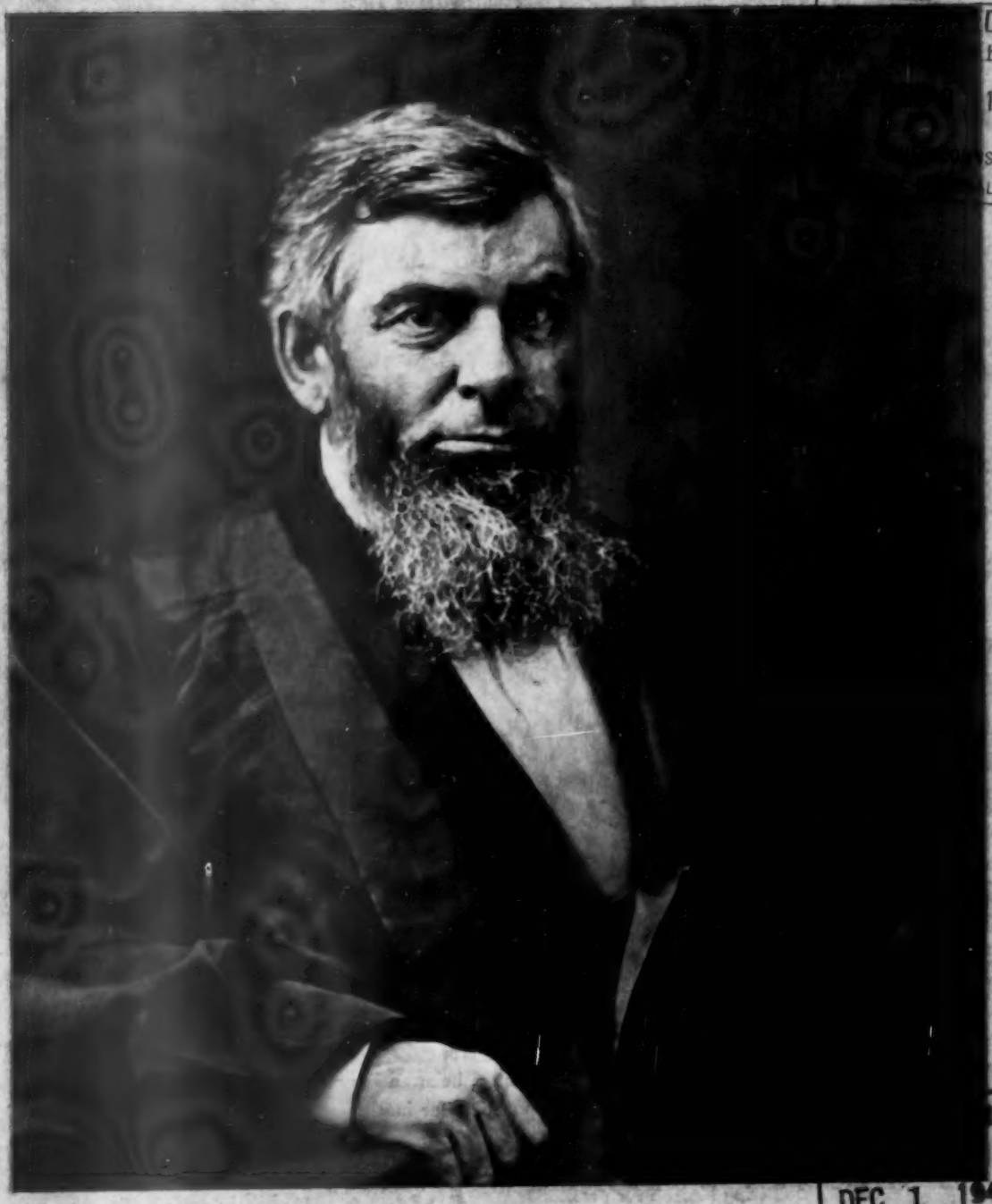

MORRISON R. WAITE

AMERICAN BAR ASSOCIATION JOVRNAL

October 1941

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IN THIS ISSUE

Our Cover—This month we portray Chief Justice Waite. The picture is from a photograph by the famous Brady, who recorded the Civil War in pictures. The Chief Justice was born in Lyme, Connecticut, in 1816, and he is buried there, but he is identified with Ohio, where he entered a law office in 1838 upon graduation from Yale and where he lived and practiced until his appointment as Chief Justice of the United States in 1874. He came to the high office in a most difficult time, with Reconstruction and the Commerce Clause looming large. Personally lovable and popular, he was greeted by the bar with only moderate acclaim, but in our own time, his reputation has risen and his merits as a judge have been more justly appraised. In his thousand opinions, over a term of fourteen years, he guided the course of the post-war settlement, interpreting the war amendments with what men began to see was justice, developed public utility law, met the great problem of the Granger Cases, narrowed due process and the contract clause and allowed more play to police power and the states, perhaps tended to elevate the public interest over the bill of rights. But Mr. Justice Frankfurter (writing of course not from the bench, but from the professor's chair) has said of him that "he belongs to the great tradition of the Court," and that "he did not confine the Constitution within the limits of his own experience, nor did he read merely his own mind to discover the powers that may be exercised by a great nation."

The neglect of Chief Justice Waite is attributed by this acute commentator to the absence of the artist in the Chief Justice; he misses the "grand style," but "the limited appeal of his opinions is due in part to something else—to fulfillment of one of the greatest duties of a judge, the duty not to enlarge his authority."

Submarine Warfare. The United States in this month of October, 1941, stands at the cross roads of history in regard to its position as a world power. It is in much the same position of trial and uncertainty as confronted the country because of the sinking of the *Lusitania* and the start of ruthless submarine warfare by Germany in 1917. The principle of Freedom of the Seas has been a main doctrine of our Foreign Policy since the presidency of George Washington. We have sometimes wavered for short periods in this regard but our consistent traditional policy, based upon our national interest, has always been one of stern insistence on the right of our ships to sail the Seven Seas with unrestricted freedom. We submit to the accepted doctrines of International Law (including Blockade in time of war), but further than that we will not budge. That is the gist of the President's recent talk.

It is for these reasons that the article by James W. Ryan on submarine warfare in this issue is particularly timely. Mr. Ryan is an acknowledged authority on his subject and he writes with both style and vision.

War Taxation. Everybody realizes that the present emergency has brought about a tax situation almost equivalent to war conditions. Most people cheerfully accept the added burdens, whether of taxes or of service, which confront them in the business of defense for the nation. One of the most important questions of taxation about which there has been little sound discussion is: The comparison from a business point of view of the tax load as between a corporate business structure and a business conducted by the individual. The JOURNAL has asked a leading student of the law of taxation to write on this important question. Mr. Wentz' article in this issue will, we believe, be read with interest and profit by all lawyers.

Law Lists Old and New. A complete listing of all the lawyers in every city, county, and hamlet of the nation 90 years ago with their addresses (24,948 of them) is found in the old volume described on p. 627 of this issue. Thumbing through the book arouses the latent archaeographic instincts that lie in every lawyer. Here is proof of the growing awareness of the unity of the bar in America at an early date. Here is an impressive showing of the significance of our profession in the life of the country a century ago. For many lawyers it will be a sort of sourcebook to run down the geneological tree of the bar in numerous states and towns of the country today.

In a particular sense here is proof of the need and value of good law lists. This book is the beginning of an important and thriving and useful by-product or adjunct of the profession as we know it today—the many excellent and valuable law lists.

Book Reviews. For most readers, a Book Review, like a Preface, is what Shakespeare called "caviare to the general." They are little read, in spite of the fact that in both of them there is often found the best of good writing. To realize this we have only to recall that some of the best of Macaulay's Essays were written as book reviews. This is equally true of Stevenson and other writers. The success of such magazines as *Readers Digest* proves that readers in our generation like their reading condensed, with the dross removed. In view of this latest development in reader psychology, it is strange that there has not been a revived interest in book reviews. May one predict that it is on the way?

The book review department of the JOURNAL has been in the hands of the same editor for more than ten years. It deserves attention from all lawyers interested in good reading.

The above advertisement is reproduced from the June 1 issue of Construction Methods. It is one of a series of trade magazine advertisements of The Corporation Trust Company, C T Corporation System, and associated companies.

An article in The Corporation Journal for June 1939 titled "Fulfilling Contracts with the Federal Government" cites cases every lawyer should study if he has a client engaged in, or about to assume, out-of-state Defense Contracts. Look up your copy of The Journal or, if you don't have it, write for a reprint of the article. No charge or obligation.

THE CODE OF EVIDENCE PROPOSED BY THE AMERICAN LAW INSTITUTE

By PROFESSOR EDMUND M. MORGAN

Harvard Law School

(CONTINUED FROM SEPTEMBER JOURNAL)

NOTEWORTHY FEATURES OF THE CODE

III

A—Qualifications of Witnesses

Rule 101 makes every person qualified to be a witness unless he is incapable of expressing himself so as to be understood by the judge and jury or is incapable of understanding the duty of a witness to tell the truth. In a few jurisdictions this is already the law; in most it changes the law in only one respect. By statutes in many states some interested persons are forbidden to testify against the estate of a decedent or incompetent with reference to some or all matters occurring before the death or the incompetency. The provisions of the statutes are various. They have almost without exception been the source of much useless litigation. For example, the North Carolina statute had up to 1919 been before the Supreme Court in 221 cases; and in New York the statute up to 1921 had been before the appellate courts no less than 324 times. Greenfield's book devotes 327 pages to an interpretation of this statute, which covers less than fourteen lines of print.

Professor Edmund M. Morgan

All such statutes are based on the fear of perjury[1] and are quite as ineffective to prevent it as was the common law rule which disqualified the parties to an action and all others financially interested in the outcome. In the notorious cases in New York and California where false claims for large sums have been presented against the estates of decedents, these statutes have never hindered the claimant from introducing evidence of conversations, promises and other conduct of the decedent. At each crucial interview one or more of the claimant's trusted friends have been conveniently present. As to smaller claims for services rendered, the same is true. As Hon. J. D. Senn, County Judge of Madison County, New York, said in commenting upon the New York provision:

> As the elder Weller told Sam, a wife may come in mighty handy to prove 'a alibi'; so she is often a great help to a claimant.

Such testimony is just as difficult to test by cross-examination and to meet by opposing evidence as is that of an interested survivor, and is usually subject to less suspicion because of the apparent disinterestedness of the witness.

Furthermore by this ineffective statutory attempt to prevent dishonest claims, honest claims are nullified. The honest claimant will not suborn perjury. In answering the assertion that without the statutory provision the estates of the dead would be placed in peril, Mr. Wigmore has asked:

> Are not the estates of the living endangered daily by the present rule, which bars from proof so many honest claims? Can it be more important to save dead men's estates from false claims than to save living men's estates from loss by lack of proof?

And Mr. Henry W. Taft, who has had wide experi-

1. "The temptation to misrepresentation and perjury in such cases, however superior many might prove to it, was doubtless thought by the Legislature to be too great to permit the survivor to speak." Harris v. Bank, 22 Fla. 501, 507 (1886). "The temptation to falsehood and concealment in such cases is considered too great, to allow the surviving party to testify in his own behalf. Any other view of this subject . . . would place in great peril the estates of the dead, and would in fact make them an easy prey for the dishonest and unscrupulous.." Owens v. Owens, 14 W. Va. 88, 95 (1878).

ence in cases involving the New York statute gives this testimony:

> By Section 829 it is sought to guard against the danger, sometimes very real, of dishonest claims asserted against decedents' estates, by excluding communications made by a decedent to an interested person. This restriction not infrequently works intolerable hardship in preventing the establishment of a meritorious claim. Furthermore, it has been enforced with the most rigorous literalness, and has been the occasion of a labyrinth of subtle decisions. A long experience leads me to believe that the evils guarded against do not justify the retention of the rule. In the early development of our jurisprudence the testimony of all interested witnesses was excluded; but experience gradually led to the conclusion that the restriction should be relaxed and more reliance should be placed upon the efficacy of our process of investigating truth. Cross-examination, for instance, has been found to be well calculated to uncover a fraudulent scheme concocted by an interested party; and where that has failed the scrutiny to which the testimony of a witness is subjected by the court and by the jury, has proven efficacious in discovering the truth, to say nothing of the power of circumstantial evidence to discredit the mere oral statement of an interested witness.

In this connection it must be noted that Rule 603 makes admissible all relevant declarations of a person who has become unavailable as a witness by death or incompetency. Consequently the survivor's testimony can be met by evidence of the decedent's statements whether self-serving or disserving. Such has been the situation in Connecticut for nearly a century. During the 1920's a Committee of the Commonwealth Fund collected data from lawyers and judges concerning the operation of these provisions in Connecticut. The following excerpt from its report is pertinent:

> A questionnaire was submitted to members of the bar and bench of Connecticut with special reference to the provisions authorizing the receipt in evidence of declarations of decedents. Two hundred and eighty-eight answers were received, of which eighty-eight recorded no experience.
>
> "The practical importance of this character of evidence in actual litigation is shown by the fact that sixty lawyers reported one or more cases where these declarations were the exclusive evidence in support or in contradiction of the claim, and ninety-three reported one or more cases where they were the most important evidence."
>
> Of twenty-one lawyers without experience, twenty thought greater safeguards necessary. Of one hundred and fifty-two lawyers having experience, sixty per cent. were satisfied with the statutes as they are. The Justices of the Supreme Court were unanimously of this opinion, and eighty-one per cent. of the Superior Court judges agreed. Of the four Common Pleas judges, three believed additional safeguards advisable. Outside of these, the only class of lawyers opposed to these provisions were those who had little or no experience with them. And those of experience who suggested amendment usually advised only the requirement of preliminary findings by the judge or the requirement of corroboration.

The answers of the Connecticut lawyers who had no experience with these provisions support the thesis upon which the usual statute is built. The answers of experienced practitioners and judges show that thesis to be built upon imaginary evils. Testimony at the Annual Meeting of the Institute in 1940 by lawyers who practised both in Connecticut and in New York corroborated the statement made to the Commonwealth Fund Committee by an experienced lawyer of Hartford:

> I have known of numerous cases of serious injustice in the state of New York where the rule is the reverse of the Connecticut rule. I do not recall any case where I thought fraud was perpetrated or injustice done and I think if I had had any such experience, I should remember it because, owing to unfortunate experiences in the State of New York and knowledge of many other instances in cases in which I was not engaged, I have entertained the opinion that the Connecticut rule was eminently superior, and if I had ever known of a case where the Connecticut rule worked badly I think I should have remembered it.

The facts then are that the disqualifying statutes invite much litigation and many vexatious appeals; that lawyers who have had experience with them have found them unsatisfactory; that lawyers practising in states having no such provisions find the lack of them positively beneficial in the administration of justice. Experience, then, demonstrates the wisdom of this Rule 101. It was earnestly debated at the 1940 meeting of the Institute and was approved.

B—Impairing and Supporting Credibility of Witnesses

Rule 106, which regulates evidence affecting credibility, puts the whole matter on a simple and sensible basis. It disregards the numerous rules of thumb upon the subject developed by judicial decisions. With few exceptions it makes admissible both on cross-examination of a witness and otherwise any evidence having substantially probative value as to his credibility. As to this, three observations are pertinent. First, it abolishes the common law rule which forbids a party to impeach his own witness. There is much doubt as to the origin of this common law prohibition, but the most reasonable explanation is that when parties were first permitted to present pertinent data to the trier of fact through witnesses, it was regarded as a matter of favor and not of right. A party who had secured the privilege of presenting information through a witness could hardly be heard to assert that the witness was unworthy of credit. Today, however, no one supposes that reception of evidence is a matter of favor, or that parties choose their witnesses; they must take them as they find them and they can prove their cases in no other way. But so firmly is the adversary theory of litigation intrenched in our common law that witnesses are considered witnesses of the parties instead of witnesses of the court for the parties. The feeble attempts to justify the rule occasionally found in modern decisions serve only as further evidence of its unsoundness. Second, many of the restrictive rules which have been evolved by judicial decision have the object of preventing a lawsuit from degenerating into a contest as to the character of the witnesses for the respective parties. This object is achieved by Rule 403, which gives the trial judge discretion to exclude evidence if he finds that its probative value is outweighed by the risk that its admission will necessitate undue consumption of time or create undue prejudice or confusion of issues or unfair surprise. The substitution of this flexible rule for a series of detailed rules of thumb enables the trial judge to admit all really helpful evidence and to exclude that which will divert or mislead the jury or waste time, and tends to discourage frivolous appeals. In particular Rule 106 permits the judge in his discretion to exclude extrinsic evidence of prior inconsistent statements or other prior inconsistent

conduct unless the witness has been given a fair opportunity to deny or explain the statement or conduct. Third, evidence of traits of character of a witness other than honesty or veracity, and evidence of his commission or conviction of a crime not involving dishonesty or false statement are made inadmissible. This, because the inadmissible evidence seldom has appreciable probative value upon credibility and always carries the danger of undue prejudice.

The rule laid down by the House of Lords in the Queen's Case, 2 B. v. B. 286, forbids a cross-examiner to question a witness about a prior contradictory statement contained in a writing unless the writing is first shown to the witness or read aloud to him. This curb on cross-examination still prevails in many of our states although it has been abolished in England. It is a protection to the shifty, clever falsifier, and of little or no help to the honest witness. Rule 106(2) expressly repudiates it and can harm no truthful witness where the trial judge has such control as is provided in Rule 105 of the Code.

It is to be noted that both the rule of the Queen's Case and Rule 106(2) apply only to the conduct of the cross-examination. They have nothing to do with the introduction of the writing as extrinsic evidence of a prior contradictory statement, or with the rule which requires the production of an original writing as the best evidence of its content.[2]

C—Privileges—Personal and Non-Personal

The division of privileges into personal and non-personal emphasizes the interests of the government in the former as opposed to the interests of the litigants or witnesses in the latter. Under our adversary system of litigation rules of admissibility and privilege are usually enforced only at the demand of an adverse litigant, except where a witness claims a privilege. In the case of non-personal privileges the court should represent the government and refuse to allow the privileged matter to be revealed to the detriment of the government regardless of the desires of the litigant or of the witness unless he be a superior representative of the government. This applies to Rules 301 to 304 which cover secrets of state, official information disclosure of which would be harmful to the government, communications to a grand jury to the extent that their secrecy is required for the effective administration of justice, and identity of informers. These privileges are recognized at common law. Under the Rules, the judge determines whether or not the desired information constitutes a secret of state or whether the disclosure of other official information will be harmful to the interests of the government: under the authorities there is much uncertainty as to whether this decision lies with the judge or with an executive or administrative officer.

The personal privileges are privilege against self-crimination; privilege against disclosure of confidential communications between lawyer and client, between husband and wife and between priest and penitent; privilege to refuse to disclose religious beliefs and political votes, and privilege against disclosure of trade secrets. They do not include any privilege for communications to physicians, bankers, accountants or newspaper reporters. The common law recognized no privilege for any of these last mentioned communications. In only a very few states is there any statutory privilege for communications to bankers, accountants or newspaper reporters. In many states statutes with varying limitations and qualifications create a privilege for communications between patient and physician. Experience shows that these statutes result in suppression of valuable testimony for flagrantly improper purposes. There is not a shred of evidence that they tend to improve the public health. The evidence is overwhelming that they foster fraud in litigation over insurance and personal injuries. In this connection it is to be noted that neither the common law nor this Code sanctions the disclosure of confidential communications between professional advisers and their clients or customers. Such a disclosure may constitute a tort or a breach of contract. What the common law and this Code do is to refuse to prevent disclosure of such communications when they are demanded for a proper purpose in a court of justice.

The general theory of the Code is that all relevant evidence should be admissible. It is universally conceded that relevant confidential communications are likely to be most trustworthy and are usually capable of reasonably accurate valuation even by an untrained trier. Therefore they should be made the subject of privilege only to the extent that sound social policy demands, and should not be buttressed by provisions which will encourage claims of privilege to be made. Generally speaking the Code preserves the personal privileges which the common law created, and contains few, if any, limitations upon them which are not supported by some respectable authority. The following provisions, however, should be noted.

1) Paragraph (3) of Rule 201 permits comment by court and counsel upon the failure of the accused to take the stand. As proposed to the Annual Meeting in 1941, Rule 106(3) forbade the introduction, by cross-examination or otherwise, for the purpose of affecting the credibility of an accused who takes the stand, of any evidence tending to show that he had committed or been convicted of another crime. The Advisers and the Council believed that Rule 201(3) and Rule 106(3) were bound together, and that good policy as well as fairness to the accused required 106(3) if comment were to be allowed on the failure of an accused to testify.[3]

2. The Council and Advisers proposed as a paragraph of Rule 106, that when an accused takes the stand as a witness no evidence of his commission or conviction of a crime other than that for which he is on trial should be admissible for the purpose of impairing his credibility. This did not make the evidence inadmissible if relevant and competent upon any other issue. It was proposed as a complement of Rule 201 (3) which permits comment upon an accused's failure to testify. It was ordered stricken at the Annual Meeting of the Institute in May, 1941.

3. See footnote to Rule 106 supra.

2) Rule 225 provides that if any privilege other than that of an accused to refrain from testifying is claimed and allowed, the judge may in his discretion comment and permit counsel to comment thereon, and the jury may draw reasonable inferences therefrom. Where such a privilege is claimed, the judge may ascertain why it is claimed; and then determine whether it would be fair to permit comment.

3) By Rule 223 a previous voluntary disclosure or consent to a disclosure by another of privileged matter, or a contract not to claim a privilege, destroys the privilege. A party should not be permitted to use his privilege as a vendible commodity, or to use it solely for the purpose of preventing disclosure in an official investigation. If he discloses it to others, he should be required to disclose it in court.

D—Testimony by Judge or Juror

As to testimony at the trial in which the judge or the juror is sitting, the generally accepted rule is embodied in the Code.

As to the testimony of a grand or petit juror, all restrictions are removed where the act, event or condition known to the juror is a subject of lawful inquiry. But where the issue is the validity of a verdict or indictment, no testimony as to the mental processes or the effect of anything upon the mind of a juror is admissible. This last is almost everywhere accepted. The former is the subject of divergent views.

E—Remoteness, Prejudice, Confusion of Issues

In handling the vast multitude of cases in which courts and writers have attempted impossible distinctions between logically relevant and legally relevant evidence, the Code gets back to first principles. It defines relevant evidence as evidence having any probative value upon any matter the existence or non-existence of which is provable in the action. It then makes all relevant evidence admissible except as otherwise specifically provided; and entrusts to the trial judge the power, as heretofore stated, under Rule 403 to exclude relevant evidence the probative value of which is outweighed by the risks which its reception would carry. It treats the myriads of cases dealing with physical capacity, skill, means, opportunity, motive, intent, design, knowledge, and conduct tending to show their presence or absence, as mere examples of this general principle. It proposes specific rules concerning character and habit and for the few situations in which the courts have evolved positive exclusionary rules that seem supported by social policy.

As to character, the Rules proposed are more liberal than those now generally accepted—when character is a fact necessary to establish a liability or defence, it may be proved by evidence of opinion, or of reputation or of specific instances of relevant conduct. Where character is to be used as a basis for inference to conduct, evidence of specific instances are generally inadmissible. The common law rules as to evidence of accused's character in criminal actions are preserved: and evidence of character as to a person's care or skill is inadmissible as tending to prove the quality of his conduct on a specified occasion.

Evidence of habit or custom is made admissible as tending to prove conduct conforming to the habit or custom. And habit or custom may be proved by evidence of opinion and of a sufficient number of specific instances of conduct. For each of these provisions there is authority in the judicial decisions.

The Code preserves the commonly accepted rule rejecting evidence of the taking of precautions to prevent the repetition of a previous harm or the occurrence of a similar harm as tending to prove that failure to take such a precaution to prevent the previous harm was negligent. It also requires the rejection of offers to compromise as tending to prove civil liability: It does not require such rejection as tending to prove criminal liability, leaving this to be cared for by Rule 403. This necessarily puts the rejection squarely on the ground of policy to encourage settlements and to avoid litigation.

Evidence of liability insurance offered as tending to prove negligence is inadmissible.

The rule as to the exclusion of evidence of other crimes and wrongs when offered to prove the commission of a specified crime or wrong is by 411 put on a sound sensible basis which has support in innumerable cases though rarely clearly articulated. Such evidence is made inadmissible only where it is relevant solely as tending to prove a disposition to commit such a crime or wrong or to commit crimes or wrongs generally. If it is relevant for any other purpose, it is admissible. The courts at common law will not admit evidence of a person's criminal or tortious character as tending to prove his conduct on a specified occasion; *a fortiori* they will not admit specific instances of his conduct on other occasions as tending to prove such character. Rule 406 does, with certain exceptions, admit evidence of relevant traits of character in civil actions as tending to prove conduct, but it does not permit such character to be proved by evidence of specific instances. This might well be enough without a specific rule. But out of abundance of caution in this instance the Code specifically excludes evidence of a person's commission of other crimes or torts as tending to prove the commission of the crime or tort charged when the only series of inferences by which the commission of the crime or tort has any probative value is from that commission to a disposition to commit such acts, and from that disposition to the commission of the act charged. In all other situations, it is admissible if relevant, subject, of course, to Rule 403.

F—Expert and Opinion Evidence

Judges and lawyers agree with commentators that the entire body of law dealing with opinion evidence needs radical revision. Mr. Wigmore says that the opinion rule "has done more than any one rule of procedure to reduce our litigation towards a state of legalized gam-

bling."[4] The rules evolved in this country which prevent a witness from relating his relevant experiences in language naturally and ordinarily used by laymen, because phrased in terms of inferences or conclusions, have invited numberless trivial appeals and have caused many indefensible reversals. They are vague in phrasing and capable of capricious application. There is an encouraging tendency in some modern trial courts to disregard them and in the more progressive appellate courts to refuse to interfere with the trial judge's application of them.

The necessity for expert testimony has been recognized at least since the fourteenth century, when the precedents show experts being called in to aid the judges. Two outstanding abuses have developed since experts have become witnesses for the parties. First, they are in most instances merely expert advocates. The shocking exhibitions in criminal prosecutions and in personal injury actions need no detailed description. Second, when an expert has not observed the data which are to serve as the foundation of his opinion, his opinion must be hypothetical, for he cannot be permitted to decide whether its foundation in fact exists in the particular case. This has led to the invention of the hypothetical question, which, as Mr. Wigmore says, "is one of the truly scientific features of the rules of Evidence," but has been so "misused by the clumsy and abused by the clever" that it "has in practice led to an intolerable obstruction of truth." A distinguished judge has described it as "the most horrific wen upon the fair face of justice."

In Rule 501 the Code attempts to make it practicable for a witness to tell about his relevant experiences in language ordinarily used in conversation and readily understood by judge and jury. It permits the witness to speak in terms that include inferences or conclusions and to add relevant inferences. The trial judge has entire control of the situation, however, and may require that the witness first state the data upon which the inferences are founded. It is no objection that the inference embraces an ultimate issue to be decided by the jury. This applies to both lay and expert witnesses. It is limited to matters which the witness has perceived, and does not touch opinions or conclusions based on what others have given in evidence. This is a sensible rule, and if sensibly interpreted will avoid the quibbling now so frequent, so annoying and so utterly puzzling to litigants and witness,—that quibbling which is expressed in the objection that the question calls for, or the witness is giving, not the facts but his conclusion or opinion.

Rules 503-510 embody substantially the same provisions as the Uniform Expert Evidence Act, which has been approved by the Committee of the American Bar Association on Improvement of the Law of Evidence. Its chief features are:

1) The judge may appoint expert witnesses where he finds that they will be of substantial assistance.

2) The parties have an opportunity to be heard on the propriety of appointing experts and the choice of experts. If the parties agree as to the experts, the judge must appoint the experts agreed upon.

3) The parties may call other experts but must give reasonable notice of intent to do so.

4) The judge may order appropriate examinations and inspections by the experts, and the filing of written reports under oath by the experts, whether or not they be appointed by the judge. Each such report is to be open to inspection a reasonable time before the expert or experts making it are called to testify.

5) The jury is to be told of the appointment of the experts by the judge. Each expert so appointed may be cross-examined by either party.

6) The expert may read his report; he may state his relevant inferences, whether or not embracing an issue to be ultimately decided by the jury; he need not first state, as an hypothesis or otherwise, the data on which he bases his inference unless the judge so orders. This does away with the necessity of the hypothetical question.

7) Provision is suggested for the payment of part or all the expert's fees by public authority.

(To be continued)

4. Wigmore, Evidence (3d ed., 1940) Sec. 1929.

POWER OF COURTS OVER RULES OF PROCEDURE*

By GORDON SIMPSON

President of the State Bar of Texas

PROMULGATION of Rules of Practice and Procedure in Civil Cases by the Supreme Court of Texas on October 29, 1940, and the consequent failure of an effort in the legislature to bring about a rejection of the rules have made certain the operation of the new rules beginning September 1, 1941. This achievement does not put an end to our duty as lawyers to continue a very earnest consideration of the question of rule-making power and to prevent a situation arising which will compel us to say the courts are not competent to make their own rules of procedure.

It is trite to say but necessary to remember that

*This article, an address made before State Bar of Texas, July 3, 1941, is the tenth published in consecutive issues of the JOURNAL in advocacy of the program of the Special Committee on Improving the Administration of Justice.

lawyers are ultra-conservative as a class and are hostile, often unreasonably so, to any suggestion of change although the need for an improvement cries out loudly. Our addiction to precedent is so deep-seated that no less than a general revolt against a given practice is sufficient to bestir us as a class into action. We can, for instance, say that no less than the failure of our special issue practice, as it grew under Texas court construction, was required to make lawyers generally favorable to changing the rules. It is rather certainly true that if our special issue practice had not bogged down to a point where it was about as remiss as the common law before the days of equity, we probably could not have achieved the results now behind us in procedural reform.

But we ought not to wait until things get so bad that something has to be done before we move to accomplish needed reforms in the administration of justice. And it is fitting that we continue our discussions of rule-making power as a part of the unremitting vigilance which is required of us if we are to discharge our responsibilities to the profession and the public.

The question of whether courts should be allowed to make their own rules of procedure is more easily answered if we have courts of vision, willing to lay aside outworn forms and practices, willing to search unceasingly for the achievement of an ideal set of rules. If we have courts such for instance as obtained in Michigan from 1850 to 1933, all rule-making by the courts would rest in peace. Although the Michigan Supreme Court during that period was at times even a celebrated court in its pronouncements of the substantive law, it was unwilling to exercise rule-making power given it in 1850 and only began to function in this regard when the legislature requested that the action be taken in 1933. If all courts were equally indifferent to their responsibilities, if they in effect abdicated their functions to the legislative department of the government, we could make out but a poor case in favor of lodging rule-making power in the courts. But currently American courts have the most encouraging attitude toward enlightened leadership that has prevailed in many decades. In Texas, our Supreme Court is obviously alive to its responsibilities and has not only laid down rules of civil procedure but has provided affirmatively for their liberal interpretation.

In taking the position that courts should have the power to make their own rules of procedure, we are not unmindful nor wanting in appreciation of the substantial contributions which our Texas Legislature has made from time to time to an expeditious, effective system of court procedure. Even before the days of the legislature, the Congress of the Republic of Texas contributed much to a simple, expeditious proceeding in Texas by providing "that the adoption of the common law shall not be construed to adopt the common law system of pleadings, but the proceedings in all civil suits shall as heretofore be conducted by petition and answer."[1]

And from time to time the Legislature of Texas has enacted many salutary and simple rules which have been carried forward into the new Rules of Civil Procedure promulgated by the Supreme Court of Texas, the legislative enactments, with only slight textual changes, forming well over one-half of the rules under which we will practice after September 1, 1941.

When the Texas Constitution was amended in 1891 limiting the rule-making power of the courts to the field not occupied by legislative enactment, we observed the beginning of an attitude on the part of our courts in the construction of rules enacted by statute which culminated in what we may justly call an intolerable situation.

More and more the legislature moved into and occupied the field of rule-making and consequently, less and less the Supreme Court undertook to make and enforce rules for the trial of cases. The legislature progressively legislated in this field, going into ever greater detail and particularity. Coincidentally with this movement, the courts appeared more strictly to construe the rules as thus laid down by the legislature. Thus court construction of legislative rules of procedure was as a whole not liberal—but was, on the contrary, strict and technical with the consequence that the rules in some instances became the all-important thing instead of the means to an end. The responsibility for enactment of salutary rules of procedure did not rest with the courts; and if an application of the rules of procedure resulted in a suitor with a good case losing his claim because of the technical application of some statutory rule of procedure, it was human nature for lawyers and courts to lay the blame at the door of the legislature, rather than to say that the courts themselves were at fault in adopting so strict a construction of the applicable rules.

And the general situation went from bad to worse. For instance, lawyers who had lost a suit on some point of procedure were elected to the legislature, and, without any regard for the whole system of procedure and its harmonious functioning, bills were urged and sometimes enacted into law to remove the particular objection of the aggrieved lawyer who had gone to the legislature largely for the purpose of amending the practice act in one particular—the particular in respect of which he lost his case. And so, for this and the many other patent ills of such a situation, the system of practice developed without order or planning; amendments and additions were haphazard and inadequate; and the untoward results which followed are not at all surprising.

The basic principle behind entrusting the legislature with the enactment of rules of procedure does not rest

1. Republic of Texas Laws, Act of Jan. 20, 1940, p. 3.

on good reasoning. Neither is it consistent with the constitutional conception of a division of our government into three departments, nor does it make for efficiency in the promulgation of acceptable rules.

The transgression of ideal constitutional limitations when we provided that the legislative department might tell the judicial department what rules it should follow in trying cases is quite obvious. Judge John J. Parker of Charlotte, North Carolina, has expressed the thought that there is no more reason why the legislature should prescribe rules for the courts to follow in trying cases than there is for the courts to prescribe rules of order by which the legislature shall regulate its proceedings.

But the most alarming trouble about the legislature making rules for the trial of civil cases is the one to which we have adverted; that is, there is no planning, order or system to the work, but it develops and grows much of its own volition, following no set principle and governed by no fixed plan; and there is no prompt or effective way to change the rules or make new ones when reforms are imperatively needed.

The legislature is preoccupied in many other things. It has such difficult and engrossing problems as revenue and taxation, appropriations, public education, the care of the indigent, public health and morals, these problems and hundreds more which press upon the legislators serious and important responsibilities. We ought not to expect a body thus preoccupied in the essential services of the people of the state to have time, nor to take the time, to provide for a simple, expeditious, effective system of rules for the trial of litigation.

And moreover, a majority of the members of the Texas Legislature are not lawyers. Consequently, they are not equipped by training, experience or education to promulgate rules for the trial of cases.

We have in a membership of 150 only 56 lawyers. There should be no serious insistence that a House of Representatives composed of 94 farmers, teachers, printers, students and so on, and 56 lawyers is properly equipped to promulgate rules of civil or criminal procedure. There should be no serious insistence that the Supreme Court and the Court of Criminal Appeals are not better qualified and equipped to pass these rules than the legislature.

Courts must have the right to make their own rules of procedure and they must function in this field in an enlightened manner if our institutions as we have known them are to survive.

No sound argument has been advanced in opposition to the principle that the courts are better equipped to promulgate rules of procedure than is the legislature.

Once the rule-making power is given back to the courts, we may confidently expect (1) a continuous, specialized, intelligent study of the rules of procedure, with prompt amendment as the need arises; and (2) a liberal application of these rules to the end that justice may be done among the parties without regard to the technicalities of the procedure involved.

It is to be hoped (and I express confidence that it is true) that such a liberal interpretation by the courts of their own rules will be made that no litigant can say that he has lost his case because of any technicality of procedure or ceremonial of form. It ought to be said in Texas (and I am confident it will occur under the new rules) that we will try our cases on the facts, rather than on the pleadings; and that the courts will award relief on the basis of the merits rather than the form or the ceremonial attendant upon the presentation.

What has been said about the rules of civil procedure which will go into effect September 1, 1941, may with like accuracy be said of our Code of Criminal Procedure. That code contains much evidence of constructive work and intelligent legislation, and again we give due credit to the legislature for the fine work it has done.

But generally speaking, our procedure in criminal cases is woefully behind the pace of enlightened reform. Since borrowing our criminal practice from the English law in the first instance, we have not made provision for any orderly program of procedural improvement. The legislature, wise as were its first enactments and certain amendments which have been added, on the whole appears to be congenitally opposed to changing the code. Time and again the County and District Attorneys Association and the Committee on Criminal Law and Procedure of our Association recommend reforms in criminal trial practice, the conventions of the Texas Bar debate and approve the recommendations, and as a usual thing, that is all that happens. To get a reform, even an imperatively needed one, by the legislature is a major operation.

Now is the time to propose and work for a bill giving the Court of Criminal Appeals of Texas rule-making power. We have an able and popular court, one to which the legislature would probably be willing to pass the rule-making power. And there is no substantial hope for reform in the outmoded and antiquated practices to which our Association points from year to year. Legislative reform has been and we are justified in saying will be slow, unplanned, incomplete and withal highly unsatisfactory.

So I recommend for the consideration of this committee a program which will include:

(1) The granting of rule-making power to our Court of Criminal Appeals, and

(2) The continued study of the civil rules and recommendations of suitable changes from time to time as the need for more simplicity and directness in trial of cases in various particulars becomes apparent.

SOME OBSERVATIONS ON THE FEDERAL RULES OF CIVIL PROCEDURE AND STATE RULES ADOPTED BY THE SUPREME COURT*

By HON. JOSEPH C. HUTCHESON, Jr.

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I WILL at the outset try to make clear, if I can, the greatly important thing in any modern system of procedural rules, and point out whether and wherein the systems under discussion have caught, or failed to catch, the vision. This is, that the prime consideration in making, and in the administration of, any set of modern procedural rules is function not method; that method shall be the servant, function the master. What is important, therefore, in any such system is the ends which the drafters had in mind accomplishing, and the spirit toward the accomplishment of those ends which breathes in and through them.

Whatever may have been the case in earlier times, a study of bar association proceedings, law journals, treatises, articles by lawyers, judges and teachers, for many years past, will convince that we are all now in agreement with the view thus expressed by Roy McDonald in "The Background of the Texas Procedural Rules" (Texas Law Review, Vol. XIX, page 3-229).

> It is essential that we agree upon a statement of the end value of civil procedure . . . the aim of civil procedure is to provide an organized forum for the orderly adjudication of controversies between parties and to provide for such tribunal, rules of operation (a) which will develop as completely as possible within the human limitations of the society in which the court operates, a complete knowledge of all the facts which created friction; and (b) which will assist in the evaluation of such events from the standpoint of justice and the awarding of such consequences as accord with the maximum feasible conceptions of justice in the conditioning society.
>
> Any procedural device or rule therefore, which impedes the investigation or the evaluation of the facts or the awarding of the just consequences thereon, is incompatible with an ideal procedure. No mere rule of procedural form or courtesy should be allowed to delay or control the disposition of the litigation upon its merits. No judgment should ever be rendered in the trial court which is based upon mere procedural technicalities and no judgment which follows a full and otherwise correct trial upon the actual issues in controversy between the parties, should ever be reversed because of such informalities. There is no vested right in rules of procedure, much less is there any vested right in procedural errors.

These abstractions will be admitted by all to be true and as far as they go, to be necessary postulates on which the administration of justice in the courts should proceed. But it is dangerous to generalize thus, unless there is full recognition that such generalization does not mean that procedural rules are of no intrinsic value and that they are written but to be disobeyed. The contrary is true of any set of good procedural rules and of any good administration under them. Procedural rules are the manners of the law and they are expected to be observed. But, just as we do not cut off people's heads for failing in their manners, and particularly because their agents fail, so should we not cut off the heads of litigants, by inflicting the loss of their claims or defenses, merely because their counsel have committed breaches of legal manners prescribed by the procedural code. When the matter is thoughtfully considered it cannot but be realized and felt, that there is a shocking disproportion between crime and penalty and a shocking misapplication of the penalty, when litigants are punished for their counsel's breaches of legal manners, by appellate reversal of judgments on procedural errors. Penalties there should be, but they should be proportioned to the breach, and they should be laid on counsel or client according to where the fault really lies. The federal rules [illustrations are: Rule 30 (g); Rule 37 (c); Rule 56 (g); Rule 75 (e)] have caught, they carry this point. They provide, as to breaches of rules which do not go to the merits of the cause, for taxing costs and expenses on client or counsel or both, according to the facts and in the discretion of the judge.

We all know that absolute and exact justice from the personal standpoint of each individual litigant, plaintiff or defendant, in each individual case, neither is, nor ought to be conceivable or attainable in an organized society. This is so because in such society the relational factor, the factor of proportion, in short of relativity, must always be kept in mind. What might seem just from the standpoint of a particular person under a particular set of facts, insulated and isolated from their impact upon the whole life of the community, and from the impact of the whole life of the community upon them, is often, when viewed in the larger aspects, seen to be quite otherwise. Therefore though finite justice as it is administered under human law, has its seat in the enlightened conscience of mankind, and aims at achieving just results under law, it may never be absolute, it must always be relative. Speaking not precisely and to a gnat's heel, as our learned branch, the professors, do, but generally and roughly as lawyers and judges do, I think I may say

*Excerpts from an address at the "Open Forum," Texas Bar Association, July 3, 1941.

that just law has been nearest attained and best administered when the actual law has struck the best balance the times admit of, between sympathy and a strong and enlightened common sense. When, in short, the pure claim of the demandant is examined and adjudicated in the light not merely of its own appeal, but of those general social considerations, out of which wisdom, prudence and a strong common sense from time to time extract principles for the guidance of human affairs.

It was a master stroke, indeed two master strokes, for procedural justice, meaning general procedural reform, when, after its many years of trying, the American Bar Association was able to get its bill through authorizing the Supreme Court of the United States to prescribe rules for civil procedure. One was that an opportunity was presented for creating a thought-out worked-out system, applicable in every state in the union, and accessible to every lawyer in it, which would comprehensively and completely encompass the whole civil practice of an entire system of courts. The other was that there existed already a uniform and simple, a just and expeditious practice throughout all of the federal courts on the equity side, so that lawyers generally were accustomed to uniformity, simplicity and directness, at least on one side of the federal courts, and thus the project of the new federal rules began with everything in its favor and a practical certainty of success. For, founded upon equitable principles, grounded in and greatly influenced by the equity rules and dedicated to the proposition that justice, and justice alone, was the end and aim of pleading, any informed one could have prophesied that the rules were certain to be few in number and brief, clear, and just in their phrasing, and so they turned out to be. Neither plaintiffs' nor defendants' rules, but designed to minimize, if they could not do away with, technical difficulties in the way of a plaintiff's recovering what is justly due him, they were drawn as well with the object of assuring to a defendant, his right to make every substantial defense he had and of protecting him fully from judgment except after a fair and just hearing.

They necessarily were the results of compromise in certain particulars, and since no one really knows either truth or justice but only its seeming, perfection is more aimed at than attained in them. But taking them by and large, they furnish a system of rules as rules, which, dethroning procedure as an end and enthroning it as means, afford a fair trial looking to a just result.

The framers of these rules were well aware of these principles and so the rules were infused with, and there was made to breathe in them, the spirit that the rules were not ends but means to an end, that end a just result. In the last sentence of Rule 1, their spirit clearly speaks: "They shall be construed to secure the just, speedy and efficient determination of every action." It speaks again in the last sentence of Rule 61. "The court must, at all stages of the proceeding, disregard any errors or defects of the proceeding which do not affect the substantial rights of the parties." It speaks throughout them in finding waiver where there is no clear objection and in discarding form of exceptions to rulings and orders. Finally it speaks where such speaking is worthwhile, in the rules for appeals which in effect declare that, notice of appeal given in time, the appeal is and remains valid and any failure of compliance with or departure from the rules will not defeat the appeal.

All of us know that as persons in authority conceive the spirit of the laws to be, they construe, interpret and enforce them. Thus, in any age and at any time, the course and progress of a proposed reform or change, as it crystallizes into laws, including of course, court decisions, may be regarded as flowing from, what those charged with the duty of making, interpreting and enforcing them, consider the spirit of the laws to be. Thus great reforms in procedure have been nullified, by a too narrow conception of their spirit. Again, small reforms, when taken hold of by great administrators, imbued with the sense of their true spirit, have taken the law a long way. With judges properly cognizant of the spirit of reform, there will be no crucifixions, no racking or lopping off of limbs, while conformity and adaptation to the rules is going on. From experience already had, I think this will be found to be entirely true of the federal rules. I hope it will be so of the state rules. The federal courts have shown and will continue to show themselves very hospitable toward the rules, very alert to give them effect in the spirit in which they were drawn, very loth to allow them to be used merely obstructively. For, a very important part of the new federal rules is the discretion which along with the mandate to do justice, they have lodged with the judge, not a discretion to do injustice, but a discretion to so utilize and enforce the rules that justice will abound. As far as the appellate court of this circuit is concerned, it has always decided and you may count upon it that it will continue to decide, that no departure from or breach of a rule, will deprive a litigant of a substantial right unless it is made to appear that that departure or breach has seriously affected a substantial right of his opponent which cannot be otherwise protected.

Something briefly of the new state rules and I am done. In the first place their adoption was strongly influenced by and partook of the spirit which animated the federal rules. In the second place while not many of the federal rules have been literally adopted, those which have been, and there are about thirty of these, are rules which carry and are informed with that spirit. The state rules as a whole were adopted in that spirit and for the same general purpose, that purpose to arrive at a just result by procedural rules, combining the greatest facility to the suitor in pressing a just demand, with the greatest protection to the defendant in resisting an unjust one.

SUBMARINE AND AIRPLANE ATTACKS ON AMERICAN VESSELS ON THE HIGH SEAS

By JAMES W. RYAN*
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THE action of Germany in American trade lanes on the high seas, outside any legitimately-maintained blockade-area,[1] in attacking the Greer (September 3, 1941), sinking the American ships Robin Moor (May 21, 1941), Steel Seafarer (September 7, 1941), and City of Rayville (November 8, 1940) and the American-owned Panamanian ships Sessa (August 17, 1941) and Charles Pratt (December 21, 1940) and drowning the American radio operator on the Sessa and the six American Red Cross nurses on a British ship and the Dutch ship Maasdam,[2] has revived in inescapable form the issue on which the United States entered the World War.

It has also raised a broader and more serious issue, because up to the time the United States entered the World War there had been no sinking by a submarine of an American or other neutral vessel (like the Robin Moor) on the high seas outside a publicly-declared submarine zone or blockade-area. The Robin Moor was an especially flagrant case. She was unarmed, and was sunk on May 21, 1941, in the South Atlantic about half way between Africa and South America. Eleven survivors, after spending eighteen days in an open lifeboat, were picked up by a Brazilian steamer and landed at Pernambuco. The remaining thirty-five, after spending thirteen days in lifeboats, were picked up by a British vessel and landed at Capetown. The vessel's cargo contained no implements of war, munitions, or other absolute contraband as defined by international law. The principal part of the cargo was destined to civilian British purchasers in British South Africa, and the remainder to civilians in Portuguese East Africa. Some of it was potential "conditional contraband" under international law, that is, it would have been contraband if it had been "destined for the use of the armed forces or of a Government department of the enemy state."[3]

When the Chief Officer of the Robin Moor protested against her being sunk, the commander of the submarine replied that there were supplies on board the Robin Moor "for my country's enemy, and therefore I must sink you."[4]

The London Naval Treaty of 1930, Part IV, Rules of Submarine Warfare, Art. 22, requires warships not to "sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety. For this purpose the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board." This is an absolute prohibition, applicable to every type of merchant vessel, enemy as well as neutral, under all possible circumstances. Forty-four countries, including all of the leading Naval Powers, are parties to this Treaty. The United States signed on April 22, 1930, and Germany adhered on November 23, 1936.[5]

The German Prize Law Code of August 28, 1939[6] itself provides in Article 73, that captured neutral vessels may be destroyed only if they have made forcible resistance, were aiding the enemy, were proceeding in convoy, or cannot safely or expediently be brought to port, and "The destruction . . . is admissible only if the passengers, crew, and papers of the vessel have been brought to a place of safety before destruction."

When the Lusitania was sunk, on May 7, 1915, without proper provision having been made for the safety of the American citizens on board, the United States protested to Germany that "it was contending for nothing less high and sacred than the rights of humanity," and that only the "actual resistance (of the Lusitania) to capture or refusal to stop when ordered to do so for the purpose of visit could have afforded the commander of the submarine any justification for so much as putting the lives of those on board the ship in jeopardy."[7] In The Lusitania, 251 Fed. 715, the court held that the owners of the vessel were not liable for the loss of life and property because they were due to the "illegal act" of the German Government.

On November 29, 1915, Germany promised, with respect to neutral vessels captured as prize, that all possible care would be taken for the safety of the crews and passengers. "Consequently the persons found on board of a vessel may not be ordered into her lifeboats except when the general conditions, that is to say, the weather, the condition of the sea, and the neighborhood of the coasts, afford absolute certainty that the boats will reach the nearest port."[8]

On May 6, 1916, Germany agreed not to sink either enemy or neutral merchant vessels "without warning and without saving human lives, unless those ships attempt to escape or offer resistance."[9]

*Author of "Freedom of the Seas and International Law," The Court Press, N. Y., 1941.

1. See The Betsey, (1798) 1 C. Rob. 92.
2. N. Y. Times, July 10, 1941, p. 10.
3. Viscount Tiverton, Prize Law (London, 1914), pp. 13-14.
4. Weekly Underwriter (N. Y.), July 5, 1941, p. 24.
5. U. S. Dept. State Information Bull. No. 114, p. 45; Deak & Jessup, Colln. Neutrality Laws, Pt. II. No. 36, pp. 1397-1398; U. S. Treaty Series No. 830; 112 League of Nations Treaty Series, p. 66; Am. Jour. Internat. Law, v. 31, Suppl., p. 137, and v. 35, p. 496; 132 Br. & For. State Papers, p. 603.
6. Reichsgesetzblatt, Part I. No. 161, Sept. 3, 1939 (tr. Comp. Law Series U. S. Dept. of Commerce, vol. 3, No. 1, Jan. 1940).
7. Am. White Book, vol. 2, pp. 171, 178.
8. German Note to U. S., Nov. 29, 1915, Am. White Book, vol. 3, p. 316.
9. German Note to U. S., May 6, 1916, Am. White Book, vol. 3, p. 302 ff.

"The untenable excuse put forward was that these ships were carrying contraband. But this begged the question by assuming, first, that there was contraband on board without making any search, and secondly, that the exceptional circumstances existed which alone justify sinking a ship for the carriage of contraband; nor would it in the smallest degree answer the charge of killing innocent persons. We need not repeat the emphatic condemnation of such practices by the Conference of Washington, 1921-1922."[10]

At the Naval Conference at Washington in 1921-1922, the five Naval Powers signed a treaty which reaffirmed the rules of international law in regard to the search and seizure of vessels by warships, including submarines, and the making of proper provision for the safety of those on board, and declared that "any person in the service of any power who shall violate any of those rules, whether or not such person is under orders of a governmental superior, shall be deemed to have violated the laws of war and shall be liable to trial and punishment as if for an act of piracy."[11]

"It should be added, in connection with the World War practice, that Germany never seriously asserted a general right to destroy neutral vessels without placing all the persons on board in safety; the indiscriminate sinkings in war zones and elsewhere were said to be justified on the grounds of retaliation and self-preservation."[12]

During the World War the United States emphasized that measures of reprisal put into effect by belligerents must not affect injuriously the rights of neutrals.[13]

Discussing the legality of submarine warfare as retaliation, the United States had said that "a belligerent act of retaliation is *per se* an act beyond the law, and the defense of an act as retaliatory is an admission that it is illegal."[14] The United States "can not for a moment entertain, much less discuss, a suggestion that respect by German naval authorities for the rights of citizens of the United States upon the high seas should in any way or in the slightest degree be made contingent upon the conduct of any other government affecting the rights of neutrals and non-combatants. Responsibility in such matters is single, not joint; absolute, not relative."[15]

The Robin Moor case is much like that of the Knight Commander, a neutral (British) vessel, which was sunk on the high seas near the entrance to Tokio Gulf by a Russian cruiser on July 24, 1904, during the Russian-Japanese War because the commander of the cruiser believed that some of her cargo was contraband.[16] She was under charter to an American company and was bound to Japan with a cargo of railroad material, bridge material, machinery, and various articles. Before the sinking all persons on board had been removed. Her destruction was described by Mr. Balfour in the House of Commons as "entirely contrary to the practice of nations."[17] In the House of Lords, Lord Lansdowne said that the sinking was an "outrage" and that "a very serious breach of international law had been committed by the captors. . . . Under no hypothesis can the Government conceive that a neutral ship could be sunk on the mere fiat of a cruiser's commanding officer, who assumed that the cargo of the vessel included articles which were contraband of war."[18] The Russian Government gave assurances that the practice would be discontinued. The United States Government sent a note to the Russian Government with respect to the sinking of the Knight Commander, stating that the carriage of contraband did not in itself justify the sinking of the vessel, but that it was not prepared to maintain that a prize might not be legitimately destroyed in case of "imperative necessity." It further said that it would "view with the gravest concern the application of similar treatment to American vessels and cargoes."[19]

On January 28, 1915, an American vessel, the William P. Frye, bound from Seattle to Queenstown with a cargo of wheat, was captured and sunk on the high seas by a German cruiser. The United States protested that this was a violation of the Treaties with Germany of 1799 and 1828. Germany disagreed with the American interpretation of the treaties,[20] and declared that orders had been given not to destroy American ships with conditional contraband, reserving "the right to destroy vessels carrying absolute contraband wherever such destruction is permissible according to the provisions of the Declaration of London."[21]

In the Treaty of July 11, 1799, Prussia and the United States[22] had provided in Articles 12 and 13 that no "articles carried in the vessels or by the subjects or citizens of either party to the enemies of the other shall be deemed contraband so as to induce confiscation or condemnation and a loss of property to individuals. Nevertheless, it shall be lawful to stop such vessels and articles, and to detain them for such length of time as the captors may think necessary to prevent the inconvenience or damage that might ensue from such proceeding, paying however a reasonable compensation for the loss such arrest shall occasion . . . ."

In the Treaty of May 1, 1828, Prussia and the United

10. T. J. Lawrence, International Law (7th Ed., London, 1925), pp. 469-470.
11. W. M. Malloy, Treaties of U. S., Vol. III. p. 3118; J. H. Latane, American Foreign Policy (New York, 1927), pp. 687-688.
12. Am. Jour. Internat. Law, Suppl. (1939), vol. 33, No. 3, p. 575.
13. Corres. bet. U. S. and Gr. Br. re blockade decree March 1, 1915, Am. White Book, vol. 1, pp. 61 ff., and vol. 3, p. 25; E. Richards, "British Prize Courts and the War," Br. Year Book, 1920-1921, pp. 29 ff.; Stowell and Munro, Cases on International Law, vol. 2, pp. 559, 608.
14. Lansing to Gerard, July 21, 1915, U. S. For. Rel., 1915 Suppl., p. 480.
15. Lansing to Gerard, May 8, 1916, U. S. For. Rel., 1916 Suppl., p. 263.
16. Hurst and Bray, Russian and Japanese Prize Cases (London, 1912), vol. 1, p. 54; T. J. Lawrence, War and Neutrality in the Far East (2d ed.), pp. 250-289.
17. T. Hansard, Parl. Deb., vol. 138, 4th ser., p. 1481.
18. Ibid., p. 1436.
19. For. Rels. U. S., 1904, pp. 333, 337, 734.
20. U. S. For. Rels., 1915, Suppl., p. 435, 493.
21. Ibid., p. 552.
22. Treaty Series, No. 293; 8 U. S. Stats. at L. 162-177; H. Miller, Treaties of U. S., v. 2, pp. 441-443.

States had agreed[23] "to ensure just protection and freedom to neutral navigation and commerce" and "at the same time advance the cause of civilization and humanity." The German Prize Court held that, in view of these Treaty provisions, Germany must indemnify the American owners of the William P. Frye and her cargo.[24]

German warships captured and sank the Dutch merchant vessels Medea and Maria during the World War, and in reply to the Netherlands protest of April 3, 1915 that "The destruction of a neutral prize is an act that international law has never sanctioned," took the position that the vessels were carrying conditional contraband, and were therefore authorized to be captured and sunk by the Declaration of London, which corresponds "in substance with the generally recognized principles of law," although not formally ratified.[25]

On April 2, 1916, on the high seas, a German submarine captured and sank a neutral (Norwegian) vessel, the Arena, and contended in justification that she was carrying contraband of war. The Supreme Prize Court at Berlin awarded damages, however, to the owners of the non-contraband part of the cargo.[26]

In the case of The Cyzne, the German-Portuguese Arbitral Tribunal held Germany liable for the sinking of a neutral Portuguese ship whose cargo consisted of pit props, which although destined to an enemy country, was not absolute contraband.

In regard to the sinking of the American vessel Leelanaw carrying absolute contraband (flax), Germany explained that the commander was unable to take it in "without exposing the submarine to danger or impairing the success of the operations in which he was engaged," but that he placed all persons and ship's papers in safety and "therefore acted in conformity with the principles of international law."[27] In a later note, Germany admitted that persons on board "may not be ordered into her lifeboats except when the general conditions, that is to say, the weather, the condition of the sea, and the neighborhood of the coast, afford absolute certainty that the boats will reach the nearest port."[28]

At the London Naval Conference (1908-1909) the Russian and German proposal was renewed but was strongly opposed by Great Britain and Japan who urged the absolute immunity of neutral prizes from destruction.[29] A compromise proposal was finally arrived at, and embodied in a series of rules in Articles 48 to 53 (fourth chapter) of the so-called Declaration of London of February 26, 1909.[30] It recognized the general rule of non-destruction and the duty of bringing in for adjudication, and the fundamental right of the neutral to a trial before a Prize Court, but also recognized that in exceptional cases a captor may destroy the neutral prize if he can prove that she was confiscable, and that she could not have been brought in without "danger to the safety of the warship or to the success of the operations in which she is engaged at the time";[31] but before destroying her provision must be made for the safety of all persons on board and the ship's papers "which the parties interested consider relevant for deciding on the validity of the capture" (Art. 50); and the owner of the destroyed innocent neutral goods on board must be paid compensation (Art. 53).

Owing to the non-ratification of the Declaration of London, however, it does not have binding force.[32] The compromise rules in the Declaration of London have been criticized as having no basis in the practice of nations in the past, and on the grounds that danger to the capturing warship and interference with the success of its operations are words of perilous ambiguity; that liability to condemnation for carrying contraband is a fact which can only be ascertained by a judicial inquiry; and that publicists speaking of destruction for carrying contraband had in mind only cargoes of absolute contraband such as arms and ammunition and never meant to justify destruction for carrying other cargoes which are not contraband under international law but are only contended to be contraband by a unilateral and unlawful extension by a belligerent of the categories of contraband.[33]

At the outset of the World War both Great Britain and France refused to recognize the Declaration of London as stating either international law or a working rule to be observed temporarily by agreement, and the other nations followed their lead. Accordingly, the rules of international law or customary law as they existed before the Declaration of London alone remain applicable, but the Declaration agrees with them in certain respects.

Under settled international law as it exists at the present time, therefore, military necessity and readiness to pay compensation, although they may be pleaded in extenuation when a neutral prize is destroyed, cannot be considered a legal justification. If military necessity alone is pleaded, without offering to pay compensation, the aggrieved neutral would be warranted in taking most drastic action against the offending belligerent; indeed, if repetition of the offense were threatened, it would be compelled to do so as a matter of self-preservation in order to maintain the safety of its crews, passengers, vessels and cargoes engaged in lawful commerce on the high seas outside areas in which naval or military engagements are in progress.

23. Treaty Series No. 294, 8 Stats. at L. 378-387; 18 Stats. L. vol. 2, pp. 656-660; H. Miller, Treaties of the U. S., vol. 3, pp. 435-437.
24. Wheaton, International Law, 6th Eng. Edn., p. 1148.
25. Overzicht der Voornaamste, July, 1914-1915, Netherlands, pp. 19-21; J. W. Garner, International Law and World War, vol. 2, p. 271; and Am. Jour. Internat. Law, Suppl. (1939), vol. 33, No. 3, pp. 574-575.
26. Entscheidungen des Oberprisengerichts, Berlin, 1918, No. 343 (1917).
27. U. S. For. Rels., 1915, Suppl., p. 607.
28. Ibid., p. 644.
29. Parl. Papers, Miscel. No. 5 (1909), p. 38.
30. A. P. Higgins, Hague Peace Conferences, pp. 557-559.
31. Arts. 49, 51; Parl. Papers, Miscel. (1909) No. 5.
32. The Hakan (1916), 2 Prize Cases 210.
33. J. B. Moore, Dig. Int. Law, v. 7, p. 527; W. E. Hall, International Law (8th ed., Oxford, 1924), pp. 899-900.

The carriage of contraband is not unlawful, and therefore the Robin Moor legal situation is not affected by the fact (which evidently from the American shipowner's records does not exist) that she may have had on board some contraband. It has been settled international law for centuries, and was recognized by the Hague Convention of 1907, that the carriage of contraband by a private merchant vessel is neither unlawful nor a breach of neutrality by the neutral government whose flag the vessel flies.

The fact that part of the cargo on the Robin Moor was destined to a belligerent port and was therefore owned by nationals of the belligerent or by non-Americans because of the requirements of the Neutrality Act, 1939, does not affect the matter.

"The modern rule of the law of nations is, certainly, that the ship (a neutral) shall not be subject to condemnation for carrying contraband articles. The ancient practice was otherwise." Under the modern rule "the carriage of contraband works a forfeiture of freight and expenses, but not of the ship."[34]

"In the case of absolute contraband, it is necessary to prove only that the goods have a destination for the enemy country, or territory occupied by the enemy. In the case of conditional contraband, however, there must be proof that the goods are destined not only for the enemy territory but for the use of the armed forces, or of a government department of the enemy state. For example, munitions of war or army uniforms (being of the nature of absolute contraband) would be liable to condemnation as good prize if it were shown that they had a destination for the enemy territory."[35] "The distinction between combatants and non-combatants is the basis for this distinction between absolute and conditional contraband."[36] The distinction between conditional and absolute contraband represented a compromise between belligerent claims to stop trade and neutral claims to carry it on, "either of which, if carried to its logical conclusion, would have destroyed the other, being in this particular like most other legal rules."[37]

In the year 1918 in the case of *The Pomona,* II. Entsch. 147, the Supreme Prize Court of Germany held that carriage of conditional contraband on a neutral ship did not justify capture unless there was ground for believing that it was destined for use by the enemy's Government or military forces.[38] It further held in the cases of *The Villareal,* II. Entsch. 317, and *The Papelera,* I. Entsch. 334, that the owners of non-contraband enemy goods on board a neutral ship which was illegally sunk by a German warship were entitled to indemnity; and in the case of *The Draupner,* II. Entsch. 162, that damages were recoverable for illegal destruction of a captured neutral vessel.[39] But Germany asserted the right of attack by submarine without visit and search if the neutral vessel was believed to be carrying contraband.[40]

"As regards the sinking of neutral prizes, Great Britain has always maintained that the right to destroy is confined to *enemy* vessels only, and this view is favored by other powers. Concerning the right to destroy captured *neutral* vessels, the view hitherto taken by the greater Naval Powers has been that, in the event of it being impossible to bring in a vessel for adjudication, she must be released."[41]

The Prize Courts in Great Britain have said that this is the settled rule of international law.[42]

"The majority of jurists and publicists who have dealt with the subject regard the prohibition as absolute, and consequently hold that where the suspected or offending vessel cannot be taken into port, she must be released whatever may happen to any contraband cargo on board."[43]

"There is . . . no clear record of destruction of a seaworthy neutral vessel not alleged to be guilty of unneutral service prior to the Russo-Japanese War. Moreover, many treaties prescribed treatment of neutral vessels inconsistent with their destruction . . . ."[44] And although Russia sank five British, one Danish, and two German neutral prizes during the Russo-Japanese War, it paid damages for doing so with respect to five of them, and the others were strongly protested, and our Government made one of the protests.[45] Since the Russo-Japanese War the only destruction of neutral vessels has been the clearly-unlawful destruction by Germany during the World War and in the present war, allegedly based on a right of retaliation because the other belligerent had also been acting unlawfully.

If Congress does not act very promptly to insure the safety of Americans and American-owned vessels from unlawful attack while bound with defense cargoes to our national or hemispheric defense outposts, or while in essential American trade lanes on the high seas outside any effectively-maintained blockade areas recognized by international law, it will obviously become urgently necessary, in the national interest of self-preservation, for the President to assume the responsibility of authorizing the Navy and Air Force to take the necessary means, and use the necessary force, to prevent such attacks and to protect the safety of Americans and American vessels.

34. The Neutralitet (1801), 3 C. Rob. 295.
35. Cf. J. H. W. Verzihl, Le Droit des prises de la grande guerre, pp. 756-767.
36. H. W. Briggs, Law of Nations (New York, 1938), pp. 938-939.
37. J. B. Moore, International Law and Some Current Illusions, p. 32.
38. See, also, Tiverton's Prize Law (London, 1914), pp. 13-14.
39. Cf. The Davanger, II. Entsch. 232.
40. The Berkelstroom, I. Entsch. 318; Cf. The Maria, I. Entsch. 45; and The Medea, I. Entsch. 131.
41. Sir Edward Grey, British Foreign Minister, to Sir Edward Fry, June 12, 1907; Parl. Papers, Miscel. No. 1 (1908), pp. 17, 18.
42. The Acteon (1815), 2 Dods. 48; The Zee Star (1801), 4 C. Rob. 71; The Felicity (1819), 2 Dods. 381; The Leucade (1856), Spinks, 217; W. E. Hall, International Law (8th ed., Oxford, 1924), p. 898; and T. J. Lawrence, Principles of International Law (7th ed., London, 1925), pp. 467-470. Contra, J. B. Moore, Digest, Int. Law, vol. 7, pp. 522-523.
43. Sir Frederick Smith (Lord Birkenhead, Attorney General of Great Britain), Destruction of Merchant Ships under International Law (London, 1917), p. 79.
44. Wheaton, International Law, 6th Eng. ed., p. 1145.
45. Ibid., p. 1148.

COMPARISON OF TAX BURDEN ON BUSINESS, AS BETWEEN INDIVIDUALS AND CORPORATIONS, UNDER REVENUE BILL OF 1941*

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IN recent years the considerations influencing the choice between doing business in corporate form and doing business as an individual or partnership have multiplied and the consequences of the choice have become more serious. It is a broad problem of which one important part is the bearing of the various forms of federal taxes based on income. The federal tax consequences of the choice may make the entire difference between a business capable of profitable operation and one incapable of profitable operation. An attitude of letting the tax chips fall where they may is reckless.

Federal taxes based on income have become a more weighty consideration, not merely because of increase in rates or degree of taxation but because of change in the kind or system of tax treatment of the income of each form of operation and of the relationships between stockholder and corporation. Concrete illustrations, as hereinafter set forth, of the effect of federal income tax on advantages and disadvantages of the personal and corporate forms of doing business are helpful in giving some specific answers and more helpful in making the effects clearly apparent, but the choice is only partly a matter of any possible arithmetic. The choice of the form of operation of a business involves the future more than the immediate present.

Formerly the federal income tax system (under normal conditions, particularly since 1921) regarded a corporation as a separate taxpayer; its income was its income and stockholders derived their only income from its business as dividends, which were original and different income; yet the tax system recognized that a corporation is artificial and stands for its stockholders who own the equity and really bear the burden of corporate net income taxes.

For example, in this concept any graduated tax truly based on ability to pay would not be imposed on a corporation and graduated according to its size or amount of its income. The excess profits tax laws of 1917, 1918, 1919 and 1921 were graduated, but even under those laws the graduated excess profits tax was not based merely on size but was graduated on the basis of percentage of return on investment. A big corporation in amount of capital or income may represent largely or entirely stockholders of small or moderate means. Accordingly, a corporation was subject to a uniform, ungraduated rate of tax that may be called for convenience a normal tax and it was not subject to a surtax. The stockholder was not subject to normal tax on his dividend income, but he was subject to surtax on his dividend income, graduated in accordance with ability to pay measured by his income. Dividends received by a corporation were not subject to any corporation income tax—the earnings were subject only to corporate normal tax against the earning corporation and surtax against the ultimate individual stockholder. Of course, the corporation and individual stockholder taxes did not dovetail exactly, but, generally speaking, the system avoided double taxation of corporation earnings.

At present for a number of purposes a corporation is not regarded as a separate taxpayer. For instance, losses are not recognized on certain sales—between controlling stockholders and controlled corporations and between controlled corporations, as defined in the Revenue Act. The Supreme Court has held that such was true before change in the statute in certain limited circumstances. Other provisions limit deduction of accrued expenses under some circumstances. A corporation may be subject, in addition to ordinary income tax, to a heavy surtax commonly called "Section 102 tax," if it was formed or was availed of to avoid surtaxes on its individual stockholders by improper accumulation of income instead of paying it out as dividends. A corporation is subject to additional surtax if it is a section 500 personal holding company which depends, among other features, on there being a limited number of stockholders and on their family relationships and the nature of its income. A corporation may be relieved of all income tax on its income which is distributed to and reported by its stockholders if it is a section 361 mutual investment company, as defined in the Act, though ordinary corporations pay income tax on their income which is distributed. All the foregoing examples show changes from recognition of the corporate entity to substantial or partial disregard of the entity.

Other changes have been in the direction of more absolute recognition of the corporate entity not only giving recognition to its legal separateness but refusing to recognize the representative nature of the entity as bearing on the reasonable taxation of its earnings. An ordinary corporation now pays both normal and surtax on its income and its stockholders pay both normal and surtax on dividends. At present 15% of inter-company dividends are included in the taxed income of a corporate stockholder, seriously impairing the position of

*Discussion based on Bill as passed by Congress, September 17, 1941.

parent corporation and operating subsidiaries. At present corporation income tax rates, both normal taxes and surtaxes and excess profits taxes, are graduated on the basis of the income of the corporation as the measure of ability to pay with no regard to the income or wealth of the stockholders who own the corporation. Less certainty in applying the present law and in anticipating the future, results from the variance in the changes and failure to base them on definite and clear concepts, unless it be the one guiding light of collecting the most revenue and collecting it where it is handy to do so.

The federal income tax advantages and disadvantages must be judged on all the facts as to each business in the light of all provisions of the Internal Revenue Code. The choice may be very different for a business already incorporated than for one not already incorporated. A partnership is not separately taxed and though the partnership form may have some consequences, such as an accounting year and method of accounting different from its members, for the purposes of this discussion partners and owners not in partnerships are referred to by the words "owner" and "personal."

Case I

Assume a business, producing total income of $100,000 per annum, with a capital investment of $1,500,000, having three equal owners, A, B and C, who have other taxable incomes subject to normal and surtaxes of $5,000, $25,000, $50,000, respectively; and no corporate salaries are paid to owners. No effect is to be given to personal exemptions, earned income credits, and the like, for purposes of illustration. Provision is made for capital stock tax on a declared value which, for purposes of safety, is at an assumed 25% in excess of the amount necessary to protect against declared value excess profits tax which is based on income after a credit of 10% of the declared value.

1. *Personal or partnership operation*

	Owner—A	Owner—B	Owner—C
Income from business	$33,333.33	$33,333.33	$33,333.33
Other normal and surtax income	5,000.00	25,000.00	50,000.00
Total tax	14,609.99	26,463.33	42,513.33
Taxes on business income	13,979.99	18,823.33	21,133.33
Business income in hand and clear	19,353.34	14,510.00	12,200.00

2. *Corporate operation*

Income	$100,000.00
Corporation taxes	31,828.12
Income less total corporate taxes	68,171.88
A ⅓ part	22,723.96

If no dividends are paid, there will be no further tax, but the owners will not have the income in hand. However, if, through failure to declare dividends, there is an improper accumulation to avoid surtaxes on stockholders, a section 102 surtax may be proposed, at rates of 27½% to 38½% on the undistributed income. Assume all net profits are distributed.

	Owner—A	Owner—B	Owner—C
Dividends	$22,723.96	$22,723.96	$22,723.96
Tax on dividends	8,369.22	12,397.14	14,170.58
Business income from corporate form all in hand and clear	14,354.74	10,326.82	8,553.38
Compare with personal operation	19,353.34	14,510.00	12,200.00
Loss from corporate operation	4,998.60	4,183.18	3,646.62

Case II

Assume the same facts as in Case I, except corporation pays salaries of $10,000 per year to each of A, B and C, which are assumed to be fairly earned and reasonable.

Corporation income ($100,000 less $30,000 salaries)	$70,000.00
Total corporation taxes	22,204.69
Income available for dividends	47,795.31
Dividends to each owner	15,931.77

Owner's taxes and final income in hand and clear

	Owner—A	Owner—B	Owner—C
Other income	$ 5,000.00	$25,000.00	$50,000.00
Salary	10,000.00	10,000.00	10,000.00
Dividends	15,931.77	15,931.77	15,931.77
Total taxes	10,635.20	21,948.38	37,635.65
Tax on business salary and dividends	10,005.20	14,308.38	16,255.65
Business salary and dividends in hand and clear	15,926.57	11,623.39	9,676.12
Loss as against personal operation	3,426.77	2,886.61	2,523.88

Note that to extent of salaries to owners, the results of corporate operation approach the tax results of personal operation.

In all cases of distribution of all net profits, the loss from corporate operation is less when salaries are paid by the corporation to its owners than when not paid, for the obvious reason that income received by the owner bears individual income tax, but does not bear corporation tax. In any given case, consideration of the choice of operation must take into account the facts respecting rendition of services by the owners and the extent of reduction of corporation net taxable income by reasonable salaries to the owners (not deductible by corporation unless reasonable). The situation may be

different as to the different owners of one business.

As to each of the owners in the above Cases I and II, there is a loss from use of the corporate form. The loss is proportionately greatest in the case of a small taxpayer, but it is always a loss (unless the owner has a loss in his other income) so long as the corporation has taxable income and all of its profits are distributed and thus taxed a second time. Assume a unit of $100 of income, a total corporation normal tax and surtax rate of 30% and an owner's average total normal and surtax rate of 25%. He pays, in effect, $30 plus 25% of $70 or $17.50, making a total tax of $47.50 equal to an effective rate of 47½%. Suppose his total individual rate is 75%, the effective individual and corporation rate is 82½%, still higher than his individual rate alone though not so much higher, because his individual rate of 75% alone leaves only a small part of the income. In the instance of the low rate person, his individual rate alone leaves a large part of the income.

Obviously the amount of aggregate tax paid increases as the proportion of income taxed twice increases. If there is no distribution, the second tax (the stockholder's tax) may or may not be paid at a later date.

Case III

Assume the same facts as in Case II, except that 70% of corporation profits after taxes are distributed as dividends and 30% are accumulated.

	Owner—A	Owner—B	Owner—C
Business salary and dividends in hand and clear	$13,584.60	$ 9,682.42	$ 8,003.28
⅓ of accumulated income in corporation subject to tax when distributed	$ 4,779.53	$ 4,779.53	$ 4,779.53
Total in hand and in corporation	$18,364.13	$14,461.95	$12,782.81
Compare with business income in hand and clear when all distributed	$15,926.57	$11,623.39	$ 9,676.12
Compare business income in hand and clear from personal operation	$19,353.34	$14,510.00	$12,200.00

Case IV

Assume same facts as in Case III as to C only, except that his other income is (a) $100,000 and (b) $250,000.

	Owner—C (a)	Owner—C(b)
Business salary and dividends in hand and clear	$ 6,557.19	$ 5,711.11
⅓ of accumulation	4,779.53	4,779.53
Total on hand and accumulated	$11,336.72	$10,490.64
Compare business income in hand and clear when all distributed	$ 8,038.85	$ 7,001.58
Compare business income in hand and clear from personal operation	$10,333.33	$ 9,000.00

The higher the individual tax rates of C, the greater the benefit to C of the corporate form coupled with accumulation. It follows from this that so far as current taxes are concerned, if C is in very high individual brackets, it may be a saving to him to accumulate all income in the corporation even at the expense of section 102 surtax.

The comparisons thus far have been on the basis that the business in the corporate form would not be subject to excess profits tax. This corporation tax, enacted in 1940 and made more severe by amendments of the Revenue Bill of 1941, is not imposed on individuals or partnerships. It is graduated not on the basis of a percentage of return on investment but purely on the basis of the amount of adjusted excess profits net income. An excess profits tax, if payable, will make the corporation form increasingly expensive as the amount of income subject to such tax increases.

The Revenue Bill of 1941 changes the computation of the income subject to the excess profits tax by disallowing the deduction of the ordinary corporation income taxes. This change was intended to and will greatly increase the number of corporations subject to the tax and substantially increase the tax on corporations heretofore subject to the tax. It may be wondered how it can be considered that a corporation has excess profits in any rational sense before its income taxes are provided for and deducted.

In computing the income subject to the excess profits tax, there is allowed an exemption of $5,000 and a credit of 8% of invested capital up to $5,000,000.00 and 7% of invested capital in excess of $5,000,000.00, or, a credit of an amount equal to 95% of average earnings for the base period years. The excess profits tax under the 1941 Revenue Bill is graduated at rates of 35% to 60%. Suppose that $50,000 of $100,000 total profit of a corporation were adjusted excess profits net income, the resulting income and excess profits tax on the adjusted excess profits income would be approximately at a 57% total corporation rate. As the excess profits tax increases in importance as a factor, it decreases the advantage of accumulation to a large income stockholder and still more rapidly increases the disadvantage of the corporate form to a stockholder who doesn't have a large income.

Case V

Assume a corporation with an income of $100,000, of which $50,000 is subject to excess profits tax, that a provision is made for capital stock tax to protect from declared value excess profits tax with a margin of 25%, and that all profits after taxes are distributed in equal

shares to A, B and C, who have other incomes of $5,000, $25,000 and $50,000, as in Case I.

Corporation taxes and net profits

Income	$100,000.00
Taxes	
Income taxes	$ 24,375.62
Capital stock tax	1,562.50
Excess profits tax on $50,000	19,000.00
Total taxes	$ 44,938.12
Business income net	$ 55,061.88

Stockholders' taxes and net profits

	Owner—A	Owner—B	Owner—C
Business profits net	$12,134.06	$ 8,522.20	$ 6,990.96
Compare net profits from personal operation	$19,353.34	$14,510.00	$12,200.00
Loss from corporate operation	$ 7,219.28	$ 5,987.80	$ 5,209.04

The kind of property and income of the business may be a factor affecting the choice of form of operation. Illustrations are the inter-corporate taxation of dividends; more favorable tax treatment of individuals on long term capital gains; and possible classification as a personal holding company with reference to certain types of income, including dividends, interest, gains and royalties under some circumstances, etc.

The question whether personal operation or corporate operation should be adopted may require a different answer in the case of a business which is already in corporate form than in the case of one which is not. An existing unincorporated business may be incorporated without realization of any gain or loss or change of basis for depreciation, etc., as a result of the transfer to the corporation. If the business is already incorporated, there are some matters consequent upon liquidation of the corporation which must be given most careful consideration. If the properties liquidated (possibly including goodwill) have a value in excess of the cost of the stock to the stockholder, he would realize taxable gain, taxable at different rates depending on whether long term gain or short term gain. Even the tax on long term gain represents a real cost of liquidation and unless offset by other deductions, any payment of tax on any gain on liquidation represents an immediate and definite cash price paid for any advantage of change to the personal form of operation. Such price is tangible and real while the possible advantages depend upon many eventualities.

It may be considered that the capital gain treatment in the case of corporate liquidations to individual stockholders may be changed to some less favorable treatment in the future. Of course, that is possible. The present treatment of capital gains may be more or less permanent, or at least not be greatly changed, because of the persuasive economic basis for the present treatment. Necessarily it is a question of weighing the certain cost against the probabilities as to the uncertain advantages.

There will be a loss on the liquidation if the properties received are worth less than the stockholder's cost on his stock. If he can use a loss of that character, he will obtain immediate tax benefit from the liquidation. If he can't use such loss because he does not have sufficient or the appropriate kind of income to offset, there is some inducement to postpone the liquidation until a time when the loss if it then exists may be used with tax benefit.

Of extreme importance is the effect of liquidation on the basis of the properties for computation of depreciation, exhaustion, depletion, etc., and subsequent gain or loss on the sale or other disposition of the property. If the property has a value in excess of its tax basis to the corporation, the liquidation would have the effect of giving the property a basis for future purposes equal to its market value at the time of the liquidation, thereby resulting in greater deductions and smaller gains, not reducing the gross proceeds from the business but reducing the taxable income, which is as good tax-wise as a reduction in rates. The reduction in taxable income may be substantial. It is possible that the present value may be higher than the tax basis of the corporation, though not higher than the stockholder's basis on his stock so that the liquidation would be accomplished with the increase of the basis on the property without realization of any gain to the stockholder. On the other hand, if the higher values exceed the basis of the stockholders, a gain and the tax thereon results, which must be measured against the benefits of a higher basis on the properties for depreciation, etc.

It may be that the present value of the property is less than the corporation's basis on the property (also either more or less than the stockholder's basis on his stock), so that on liquidation the property would acquire a basis for future computation of gain or loss, depreciation and the other deductions mentioned, less than the amount of the corporation's basis on the property. The difference may be small amounts, hundreds of thousands or millions of dollars. An extra dollar of depreciation may be worth almost as much as a dollar of income, if the individual has other income. Certainly if there is any great difference between the present value of the properties and their basis to the corporation, the effect of change in basis is of tremendous importance. It may be extremely beneficial or it may be disastrous.

It is apparent that it is not possible to generalize as to when either the personal or corporate form of corporation is more desirable than the other, even if we only applied the present law, whereas we have to consider changes in the law. If the past is any guide, changes in the law not only may occur; they will occur. The decision is a matter of judgment based upon consideration of each separate case in all its aspects in the light of the course of development of income tax law, needs for correction, public attitudes, and government revenue necessities.

THE TAXATION OF FICTITIOUS PERSONS

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A LEGAL fiction is an untruth invented for the purpose of telling the truth. The legal fiction best known to lawyers is the personification of corporations. Corporations are not persons in fact, but lawyers treat them *as if* they were in order to explain certain legal facts.

It has been said that if a man tells a lie often enough he will come to believe his own fiction. There is a story about a man from Kokomo who used to tell tall stories about his horse. In fact, he had no horse. But this man lied so much about the creature of his imagination that one day when he was in Indianapolis thinking about his wonderful steed, he bought a saddle for it.

A somewhat similar illusion seems to have resulted from the frequent use of the corporate fiction. Even lawyers sometimes forget that the word corporation is merely a collective noun—a shorthand device to convey the idea of an aggregation of men, women, and children standing in certain relations to one another and to outsiders. It might be said that a corporation is a flock of stockholders. Now a flock of birds is not a bird; and a flock of men is not a man. An aggregation of men may be a mob, a church, a partnership, or a business corporation; but it can not be a living person.

It is in the matter of the taxation of corporations that we have forgotten the fictitious nature of the corporate personality. State and federal tax laws treat large corporations as if they were rich men. A big corporation, on the contrary, is not a rich man. It may not even be an aggregation of rich men. Of course, all very large corporations have a few stockholders who are rich men; but most of them are more likely to be men and women with only moderate-sized incomes.

Here is some information taken from annual reports of two large corporations. These figures provide some insight into the nature of the holdings of the average shareholder:

1. The United States Steel Corporation is owned by more than 200,000 stockholders. Each stockholder on the average owns only about 57 shares. Forty-two percent of these stockholders are women.

2. The American Telephone and Telegraph Company is owned by more than 600,000 stockholders. The average number of shares per stockholder is 29. No stockholder owns more than 1% of the total number of outstanding shares. More than half of the A. T. & T. stockholders are women. Many children are beneficiaries of shares held in trust.

Legislators seem to have the idea that because a corporation is large and has a large income it therefore can easily bear the burden of a high tax rate. That is not generally true. A tax of 24% against the net income of a corporation may be equivalent to a tax of 24% against the individual incomes of the men and women who own the company.

American business corporations in 1941 are subject to a multiplicity of federal and state taxes. At this writing (previous to late 1941 revisions by Congress) there are four federal taxes, as follows:

1. A normal tax on net incomes graduated from 14.85% to 24% according to the size of the corporate income.

2. A capital stock tax of $1.10 on each $1,000 of the adjusted declared value of the capital stock.

3. The declared value excess profits tax.

4. The excess profits tax of 1940.

Thirty-two states and the District of Columbia also impose taxes on the net incomes of corporations. Seven of these states (Arizona, Idaho, Minnesota, Mississippi, North Dakota, South Dakota, and Wisconsin) apply progressive rates. In South Dakota, for example, corporations in the lower brackets pay only 1% while corporations with larger incomes pay graduated rates up to 8%.

Corporations are also subject to the property taxes imposed by state and local governments having jurisdiction over the real and personal property of the corporation. Stockholders in some states also have to pay an intangible property tax on the assessed value of shares owned.

The theory of the graduated income tax is good so far as it applies to individuals. With the usual provision for exemption of small incomes, the principle of progression takes from the taxpayer the least useful parts of his income. When the rule is applied to corporations, however, it is to be observed that taxpaying ability does not increase with the size of the corporate income. A corporation is an artificial legal unit having no feeling and no sense of personal sacrifice. To measure the sacrifice, we must look toward the shareholders.

This is not a plea for the exemption of corporations from taxation. Corporations are too rich a source of revenue to be overlooked by the taxgatherers. The point here emphasized is that the use of progressive rates against corporate net incomes is a wrong application of a legal theory. To regard a corporation as *genus homo* when devising a tax scheme is an unjust use of a legal fiction originally invented for a good purpose.

BOOK REVIEWS

Rolls of the Justices in Eyre: Being the Rolls of Pleas and Assizes for Gloucestershire, Warwickshire and Staffordshire, 1221, 1222. Edited for the Selden Society by Doris Mary Stenton [Selden Society Publications, Vol. LIX]. 1940. Pp. lxvi, 830.—With this volume Mrs. Stenton completes the publication of the records of the first general eyre of Henry III, which began in 1218 and ended in 1222. The pleas for Lincolnshire were published in Volume 53, and those for Yorkshire in Volume 56 of the Selden Society publications, and for all three we are indebted to the fine scholarship and assiduous labors of Mrs. Stenton. Each successive volume is an additional and high service to history and law and renews our regrets that the resources of the Society and its supporters are not many times multiplied.

The title-page mentions Staffordshire (for which only a list of final concords survives), but omits Shrewsbury, of which the records fill more than 150 pages of this volume. This is an important fact because Shrewsbury was a border county, largely settled by French—chiefly Norman—soldiers. Saxon names scarcely occur at all. It is significant that, as stated in the first plea of the crown for the county (no. 1209), there is no murder fine nor frankpledge there, and consequently no presentment of Englishry.

The eyres are a fertile and insufficiently used source of detailed historical information about the life of the people. Many of the most characteristic bits the editor collects in her preface. It may be said that there is less record of violence in this volume than in those dealing with Yorkshire and Lincolnshire. The disturbances that continued after John's death have somewhat subsided. England is firmly governed by Hubert de Burgh as Justiciar for the boy King. It may also be noted that the great Archbishop, Stephen Langton, is still alive and in a sense a joint regent of the Kingdom. In the next year, 1223, he was to force a reissue of the charter from a recalcitrant group of royal advisers. The King's justice deals sharply even with such great men as the Earl of Warwick, who pays forty marks because his bailiff for four years unwarrantably ploughed the field of Richard of Clarendon (no. 406), but against such a public enemy as Fulkes de Bréauté less drastic action is taken (nos. 91 and 1027).

One or two other striking incidents may be mentioned. There is the account which Mrs. Stenton calls "a love story of King Stephen's day" (p. lxv) of the honest but vagabond knight *(probus et itinerans)* Warin, who carried off his lady-love, Isabel, despite her family (no. 389). It is not merely a love story but it illustrates the position even of a *miles* who had no feudal connections and therefore, as the text has it, "could not refrain from robbery." It gives a new and—I suspect—more realistic meaning to the word "knight-errant."

Again, there is the story of Samuel, the first-born son of Serlo (no. 232). Samuel went overseas leaving his father ill. The younger brother, Gilbert, remained at home and after his father's death did homage for the land. Then—it may have been after many years—Samuel came home and demanded his inheritance, but was temporarily satisfied with living as his brother's guest in his father's house. Within a month, Gilbert died, and Samuel with the aid of sheriff Engelard dispossessed his sister-in-law, Sibyl, and her children—apparently all daughters. But the sheriff promptly reseized the land for the widow. Finally a compromise was made with the permission of the judges. Samuel surrendered all his claim and Sibyl and her daughter gave him a life interest in the wheat of two acres to be received each Lammastide. After Samuel's death, this reverts to Sibyl and her daughter, Margaret. It is a human and quite English solution. Hollywood is invited to send its writers to the records of this eyre.

The matters of legal interest which supplement or qualify our notions of early developments in our law are too numerous to list. The jury is still in an inchoate stage. It retains in part its character as a burden that may be imposed on unwilling persons, as in John's charter to the Bishop of Bath and Wells (no. 66). However, it may at times be worth paying for, as in nos. 832 and 966. And it may be impanelled and bring in a hanging verdict, even though the accused refuses to put himself on his country (no. 728). The Lateran Council of 1216 had made ordeals difficult, if not impossible. The jury is not quite ready to take the place of the old form of trial. Its composition is various. Once when a case is postponed, it turns out that the jurors are too poor to come again and knights and other *liberi homines* are appointed (no. 90).

The concept of the murder fine (and of murder as a crime) is changing. The original notion required that the perpetrator be unknown. This is still essential in the Dialogue (I, X) and in Glanvil (XIV, 3). Bracton, long after this eyre, insists with emphasis on this requirement (f. 134b), but as Maitland pointed out (P. & M. II, 487, n. 3) the cases do not always bear him out. Many of the cases here impose the murder fine although the assassin is well-known indeed (no. 926). Frequently he takes sanctuary and abjures the realm (nos. 961, 968) with the consequent outlawry, confiscation, and escheat. This specifically contradicts Bracton's statement (f.135a). There is much force in Maitland's suggestion that the murder fine is paid unless the assassin is actually produced for punishment. The distinction between homicide and murder is waning.

The beginnings of a legal profession are evident enough (p. lxiii). And it may be that one of its sources is a hitherto unexpected one. It is often difficult to get

the fifteen Knights necessary for the Grand Assize. But some names appear so frequently that we may suspect that they are almost professional in that capacity, which suggests a group of men learned in the law in constant attendance. At the bottom of one membrane (p. 177) the clerk notes down names of such persons. One of them—who appears in nine cases—is one Richard Peche who on one occasion (no. 535) is "in mercy for foolish speaking," *pro stultiloquio.* His professional descendants may well be glad that they are subject to no such discipline.

One interesting case illustrates the growth of seizin (no. 257). Mrs. Stenton goes too far, I think, in stating (p. xliii) that the judgment supports Bracton's view that a man "can retain seisin *animo solo* even though he never cultivates or goes near the land," for which she quotes Pollock and Maitland (ii, 54, n. 2). But the judges merely decided that Philip, the father, did not die seized "as of fee," as he evidently did not, since he not only made a gift of his land to his son but had his son do homage for it to the lord of the land. They said nothing of Walter's seizin—Walter being in Ireland at the time of Philip's death.

I think it likely enough that if the question of Walter's seizin had been at issue, they might have found him seized through his mother as agent and guardian and for that it might be well to quote not the mere general Romanizing of the Bracton passage quoted by Maitland (ff. 38b, 39) but the quite specific statements made later on: (ff. 262, 262b). It is not that seizin once obtained continues indefinitely, but that it may be carried out through an agent or a guardian. Physical possession is still essential. If Walter had been Philip's subvassal—*in ligia potestate Philippi* (Mrs. Stenton's translation is somewhat misleading here)—Philip might have had a sort of seizin as *capitalis dominus* in possession. (Bracton, f. 134 b.). It is noteworthy that in the avoidance of subinfeudation we find in practice what was to become mandatory long afterwards by the Statute *Quia Emptores.*

In all three volumes of the eyre, there is a group of cases which may be of moment both in the history of the pledge of lands and of the term for years. The word for granting a term is *dimittere* (demise), but is clear that a synonym for *dimittere* is *invadiare,* "pledge." That the termor or pledgee has no tenure—does not "hold" at all—is abundantly clear. And in all instances but one—to be mentioned later—the pledgee, if he really is one, holds for a specific number of years and not till the debt is paid. Further, in all instances, there is no yearly rent, but, we may assume, a lump sum paid in advance for the demise of the term.

May we find here a hint as to the origin of the term of years, one of the mysteries of medieval land law? The very extensive debate on the subject has missed what seems to me one of the chief points. How did the notion of a term for years arise at all within the feudal land law? The essence of feudalism was the personal bond between lord and vassal. Tenure, whether of land or of anything else—and there were other things—was the incident. This bond scarcely admitted of an arrangement for a fixed number of years.

The word, *invadiare,* in these cases may indicate that all these so-called leases were really pledges in which the church-ban on usury was not merely evaded, but avoided. We may remember the scathing words of the Dialogue and of Glanvil on the gage of land, in which the debt remained the same although the creditor was in possession and enjoyment. That was plain usury, because the creditor could not help getting more than his debt. But if the security for the debt was a term of years, the creditor took a chance that the proceeds would be less as well as more than the debt, and such security did not contravene the canon law, provided it was a reasonable speculation. Owners of land who needed ready money did not lose their tenure and its valuable feudal incidents, and were in no danger of losing it, while the creditor was saved from the very real perils of usury.

That this was not enough for creditors, the development of the "common-law mortgage" in the fourteenth century makes clear enough. But if a term of years was originally created merely as a means of raising money which should not impair the feudal status of the borrower, we are helped somewhat in understanding the beginnings of an institution that grew so rapidly and gave the common law such trouble. Maitland with his usual keenness seems to have noted this possibility, although he does not develop it.

A different situation is presented by the pledging of half a messuage in Ludlow in Shrewsbury to one William as security for the payment of a mark as the marriage portion of his wife (no. 1127). This would be a real pledge and clearly usurious if it were not for the peculiar character of this transaction. The lady is given in marriage "according to the law of Breteuil." This is a city in Normandy by the custom of which women had a large legitime in the property of their husbands, and daughters ampler rights of succession than elsewhere. That parties in England could by compact impose this foreign law on English land is a striking fact. How it was to be enforced we cannot be sure, but the pledge may be part of that custom. That the "law of Breteuil" is chosen may be an historical accident. The first Norman earl of the neighboring Hereford was Richard of Breteuil. Hugh, the father-in-law of William, may have been descended from a follower of this Richard.

All this is a slight indication of the wealth that these sources contain. Perhaps they will be fully utilized some day.

MAX RADIN.

University of California

A Kaleidoscope of Justice: Authentic Accounts of Trial Scenes from All Times and Climes, by John H. Wigmore. 1941. Washington Law Book Co. Pp. 751.—Dean Wigmore's Kaleidoscope of Justice, if put in a colored flap and perhaps slightly reduced in size and price, might easily become a best seller. The subtitle of "Trial Scenes from All Times and Climes" offers only a pale suggestion of the absorbing reading contained in its seven hundred pages of authentic accounts of actual legal processes in every land,—primitive, barbaric and civilized,—from the days of Hammurabi and Haroun Al Rashid to the Indian trial of a Choctaw Chief by his own tribe in 1940.

Although compiled ostensibly for lawyers, this book offers to the lay reader a collection of historical and factual episodes more thrilling than an equal number of the best detective stories. For court trials—and how the present day court grew to be what it is, is traced from the earliest days of tribal revenge—inevitably present all the essential elements of melodrama,—crime, pursuit, capture, and retribution. Taken largely from the records of travel and adventure by eye witnesses of the scenes described, this is exciting stuff,—whether it be the accounts of the various ordeals of "hot iron," of "boiling water," of "fire," or of a "trial by battle," with all the pomp and pageantry of the time of Queen Elizabeth, of the murderous tribunals of the Terror, of torture under the Inquisition, or of criminal proceedings in Mecca, the Yaman, Sinai, or in Outer Mongolia.

Here you may read the case of "Zelophehad's Daughters" and of "Susanna and the Elders" from the Old Testament, the trial of Socrates and that of Paul at Caesarea for sedition, of Joan of Arc, of Benvenuto Cellini for assault, of Peter the Great's torture and condemnation of his own son, Alexis, of a blood feud in modern Montenegro, and of the justice of the Khalifs in Bagdad's palmy days, as well as of pioneer courts, juries and vigilantes in the early days of the United States and of Alaska. We see justice administered in Persian, Greek and Roman times, among the Aztecs and Egyptians, Japan, Burma, Annan and Central Africa, in Scandinavia, at the "Althing" in Iceland, in Italy, Switzerland, and Mediaeval France.

The very names intrigue the imagination: "The Case of the Stolen Fish," "The Case of the Missing Hare," "The Manx Deemster and the House of Keys," "Richard de Anesty's Five-Year-Long Suit in A.D. 1158 in Quest of Justice," "The Case of Arnold the Poor Miller," "The Case of the Loyal Lover Who Falsely Confessed Himself a Thief," "The Case of the Drowned Beggar's Corpse," and "The Ordeal of the Red Hot Spoon."

There is not a dull chapter in this extraordinary galaxy. We read not because we want to know how people have settled their disputes in all parts of the world from earliest times, but for the human interest on every page. For sheer entertainment this book equals the Arabian Nights, Cellini's Memoirs, or Sherlock Holmes. It is worth a dozen period plays, cloak-and-sword dramas, or Balkan operettas. Here is everything from the Icelandic Sagas to the Koran and the Gold Rush. So ubiquitous is the compilation that the only obvious omission seems to be a policeman's trial before Hon. William S. ("Touchin' on and appertainin' to") Devery, "the best Chief of Police New York ever had,"—and probably the worst.

I know of no similar parade of historic characters in their legal environment, or such a colorful panorama of costumes and customs, as in this well-named kaleidoscope of justice. Here you see all the elemental passions at work together with the primitive and superstitious methods invoked (even today) to detect guilt, the evolution of trial methods, with the actual development of the tribunal, in the origin of the charge, the arrest and detention, the accused's helpers, the proof, the deliberations and the judgment.

Capping all this monumental research is Professor Wigmore's convincing epilogue in which he analyzes what it all means and the inferences to be drawn from it. This book is the brilliant conception of a brilliant legal philosopher, who, to use his own words, offers it "not for recording any scientific views, but to enable the reader to share the entertainment which the compiler has had in perusing these records of the varied ingenuity of the human mind in devising ways of doing justice." In any case we owe him our hearty thanks.

ARTHUR TRAIN.

New York City

What Is Democracy? by Charles E. Merriam. Pp. 115.

Democracy in American Life, by Avery Craven. Pp. 143. 1941. The University of Chicago Press.—These two books are the first and second of a series of six, containing lectures under the Walgreen Foundation for the study of American Institutions. "To foster an intelligent citizenship and patriotism, not narrowly nationalistic in their expression, and with thought and knowledge much more than emotion as their foundation, is a principal purpose of this Foundation." And the purpose of the Foundation is a definite accomplishment of these books.

The first is an answer to the title-question. Although it draws from the author's extensive study and experience, it deals with the present and looks to the future. It is a tocsin and a tonic.

The author admits that the recent attacks upon democracy, "both from the right and from the left, and for diametrically opposite reasons," have been confusing, "but," he adds, "if you look at them carefully, the confusion disappears, for democracy emerges from both attacks as something that stands in the way of impatience, either right wing or left wing."

Democracy is defined as "a form of political association in which the general control and direction of the commonwealth are habitually determined by the bulk of the community in accordance with appropriate under-

standings and procedures providing for popular participation and the consent of the governed."

The author points out that democracy may disappear from time to time but it does not die. Whatever may happen in the various interims, the democratic principle will triumph. "The common good in the long run will be determined by the community."

The author takes courage from the accomplishments in America and looks with hope to the future. "We need not stutter or stammer when we say democracy is the ideal state. We know this by reason; we know it by observation and experiment. We have faith that in the fulness of time the ideals of democracy, of liberty, of equality, of justice, will be accepted by all mankind. We know that despotism and violence are pretexts for power, not philosophies of life."

In his thought there is no place for the apathy, cynicism, or defeatism which have afflicted so many of our young people today and some of our elders. "The new world into which youth now comes is not merely an economy of abundance in the sense of having plenty of goods, materials, and services of a wide range of kinds. The new world is a period of creative evolution; it is a destiny not imposed from without but springing from the creative, constructive forces of man. . . . Each may make some contribution not only to the preservation and perpetuation of our race and its culture, but also to their advancement toward higher levels of attainment. In this joint enterprise, power and authority become creative instead of oppressive; the leaders are not those who crush and bruise but those who heal and help."

The book concludes: "Of all the years that mankind has wandered on the earth, this is the time when man is most nearly master of his own destiny. We study and understand nature and human nature so that we may shape finer and nobler forms of personality and of common welfare. This is the mission of cooperation in the democratic political society."

The second book reviews the democratic faith in its American historic perspective. This historic setting is not a chronology of names, battles, and elections; it is an analysis of economic and political conditions and a study of social forces at work.

> "Democracy was no American invention. The American way of life, which is democracy in action, is, on the other hand, a uniquely American thing, as strong and as weak as the American people themselves."

This way of life is traced from its Jeffersonian origin through our expansion of the frontier, the Civil War, and the Industrial Revolution. It developed "the respect for and the confidence in men as men." The American "had to trust others, and he had to be worthy of the confidence of others."

It was impossible, without united effort, to maintain the balance between the inconsistent ideals of freedom and equality. Pioneer freedom created inequality and social evils. Discontent developed "the tendency to look to government as an agent of social betterment." And Americans "accepted without doubts the idea that Christianity offered a sound basis for genuine democratic practice in society."

These books should be required reading for our profession, if not for our people generally. They bring to our confused times the blessings of truth and light. They dispel bias and prejudice and impel courage and faith. Their style is unaffected. They are easily handled and easily read.

ROBERT N. WILKIN.

Cleveland, Ohio

Fundamental Economic Issues in National Defense, by Harold G. Moulton. The Brookings Institution, Washington, D. C. 32 pages.—This pamphlet from the pen of the president of the board of trustees of the Brookings Foundation puts and answers four questions of the deepest and most vital importance to the country at the present juncture. A volume of several hundred pages would be required were the author to argue his points elaborately. But, while the treatment of the complete subjects covered is brief, the conclusions reached are clear and sound. The majority of enlightened persons familiar with scientific economic literature will heartily endorse the positions taken by Prof. Moulton and the definite suggestions put forward. A minority of radical thinkers will dissent or insist on certain qualifications.

The questions discussed are these: Will the defense program necessarily involve extensive readjustments in the nation's economic life? Can this program be financed without an enormous increase in the public debt? Can serious and dangerous inflation be avoided? Are we threatened with a catastrophic collapse at the end of the war?

Since the pamphlet was published, certain economic and political developments have emphasized the validity of the conclusions advanced therein, and have also compelled some short steps by the government designed to avert inflation, consolidate financial and economic policies, and prevent waste, confusion, and demoralization. The pamphlet is truly a tract for the times, and should be followed by another to bring the candid discussion up to date.

Constitutional Powers and Limitations, by Major Edward H. Young. 1941. West Point: United States Military Academy. Pp. VIII, 215.—As a graduate of the Class of 1941 at the United States Military Academy it was my privilege and pleasure to study law under Major Young. This handy volume of 200 pages is an "outline analysis" of some phases of Constitutional Law written especially for the use of the cadets at the United States Military Academy during their subcourse in Constitutional Law. Though this is not generally known, law has been taught at West Point for one

hundred and twenty years.

The subcourse in Constitutional Law was designed, generally, to teach some of the more important phases of Constitutional authority, guaranties and limitations. Special emphasis is placed on teaching the source and extent of military authority, the limits within which military authority may be exercised, and the relation of the military establishment to the legislative and judicial branches of the Federal Government and to the governments of the several states.

The limited time available (14 hours) for this subcourse, in which this book is used as a text, and the special purpose it was designed to serve occasioned the high degree of selectivity exercised by Major Young in treating subjects within its broad title. Its compass is well presented in the chapter-headings: Legislative Power, Executive Power, Judicial Power, Interstate Commerce, War Powers, Martial Rule and Military Government, Federal Territory, American Citizenship, Federal Criminal Law, Private Rights and Due Process of Law. Under each of these subject-titles, Major Young emphasizes those phases of Constitutional authority of greatest interest to the military.

The text is clearly, forcefully, and concisely written. Practically every assertion is supported by footnotes indicating the authority for the statement. The book contains a wealth of instructive information, interestingly treated in a pleasingly simple style.

CURTIS W. CHAPMAN, JR.

Fort Belvoir, Virginia

Real Estate Titles and Conveyancing, by Nelson L. North and DeWitt Van Buren. Rev. Ed. 1940. New York: Prentice Hall. Pp. 719.—This new edition of a book published a little more than a decade ago represents a successful attempt to cover in a broad way the field of title examination. It begins with a clean cut and popular view of the development of real property ownership and in a general way the present status of rights and interests in land. It then goes to the matter of descriptions under government survey, by lot numbers, by monuments, and by metes and bounds.

It gives to one unfamiliar with the subject a real idea of what it is all about, and is helpful by way of reminder to one with experience behind him.

There are instructions and suggestions as to abstracting and the examination of title and the reading of title, a statement of some of the leading principles of title insurance and the fundamental rules for the closing of title, with ample illustrations. These matters comprise about the first half of the book.

The latter half is largely devoted to forms for the various states—forms of acknowledgments, contracts of sale, deeds, mortgages of various kinds, deeds of trust, assignments and releases. It is in its nature more ephemeral than the earlier half of the book, because so much of what is there rests upon statute. There is an adequate index to the whole volume.

The flaws in the work are largely in the way of inaccuracy in its general statements growing out of the fact that it is obviously based upon the law of one state although professing to be a book for general use. The authors forget at times that those who use the volume are apt to be inexperienced and fail to recognize the necessity of constant iteration and reiteration of the proposition that what is true in one state may not be in another. Just by way of illustration we may turn to the discussion of tenancies by the entirety. There is no suggestion that while the estate may exist, with or without modification, it is not universally recognized as a feature of the common law as applicable to this country. One might easily be misled by this particular generality of statement.

So in the consideration of the subject of records in the statements that the county clerk—assuming that there is such an officer in a particular state—will record this or that document, we have what is perfectly true in one state but not in another.

Similarly a statement later on that a rendition of a judgment and its docketing in a certain land office creates a general lien on land may or may not be true.

In this connection the discussion of the time when the lien probably runs is misleading. Certain of the forms for acknowledgements to be taken by a notary public where there is no reference to a seal and apparently no seal to be affixed may under certain statutes be all right for acts done within the state but null and void for acts done outside of the state.

This but emphasizes the necessity of making it plain and doubly plain that real property law is in a very real sense annexed to the soil and that where general statements are made they should represent what is universally true or must include in them the warning that they are illustrative only and not to be taken too seriously as stating the law of any individual state.

This is about all the carping criticism in which one may indulge. The volume taken as a whole is sound and useful.

GEORGE E. BEERS

New Haven, Connecticut

Federal Tax Handbook, 1940-1941, by Robert H. Montgomery. 1941. New York: The Ronald Press. 2 vols. Pp. xii, iv, 2331.—Containing nearly twice as many pages as its predecessor published two years ago, this work shows the steadily increasing complication of our federal tax laws, and is a reminder of the rapidity with which they change. It speaks as of December, 1940, and already a few of the provisions it discusses—for instance, some important provisions about the excess profits tax—have been amended. The volumes as a whole maintain the good standard set by their author in his previous handbooks.

ROBERT N. MILLER.

Washington, D. C.

Criminal Youth and the Borstal System by William Healy and Benedict S. Alper. 1941. New York: The Commonwealth Fund. Pp. 251.—As early as 1895 a departmental committee of the Home Office pointed to the high crime rates of the youth of England and the need for special treatment methods in order to deal more effectively with this group of offenders. Shortly thereafter the Prison Commission under the chairmanship of Sir Evelyn Ruggles-Brise began to experiment with the segregation of youthful prisoners from the older ones and subjecting the former to a special regime. By 1902 the entire prison at Borstal, a small village near Rochester, was being utilized for this purpose, but not until 1908 did Parliament modify existing statutes in a manner permitting a more satisfactory development of the scheme. In the Prevention of Crime Act of that year, a limited indeterminate sentence was established for youths of 16-20 years of age inclusive (later the maximum age was made to include those 21 and 22 years of age) and directions given to the courts as to the use of this sentence. The Act gave official recognition to the experiment already made at the Borstal prison by applying to the new provisions the generic term of Borstal treatment. This Act as later amended by statute and by the Standing Orders of the Home Secretary still governs the Borstal system.

Borstal treatment is recognized as reformatory in aim. The youth is sentenced to the Borstal either by courts of summary jurisdiction (in the case of youths guilty of a serious offense having previously been committed to an approved school), by courts of quarter sessions and assizes (when the youth *a.* has been convicted of an offense punishable by at least one month's imprisonment without the option of a fine and has previously been convicted of an offense or has failed on probation; or *b.* has been convicted of an offense punishable by penal servitude or imprisonment), or he may be transferred from a regular prison on order of the Home Secretary. The sentence is almost invariably a maximum one of three years followed by one year's parole supervision, violations resulting in re-imprisonment for not more than one year. Release on licence, or parole, may be made after six months for boys and three months for girls. Parole supervision is given by the Borstal Association, originally a private group of volunteers, now supported almost exclusively by government subsidies.

The Borstal system now includes some ten institutions ranging from walled prisons to open camps. It has developed gradually under very intelligent direction from the Prison Commissioners, of whom Mr. Alexander Paterson should be given special mention in this connection. Staffed by carefully chosen governors and housemasters, the institutions have successfully applied the best of known methods of rehabilitation and have achieved a renown that has caused them to be imitated in many countries, including Belgium, Germany, and the Scandinavian states.

In the book under review the authors have given a very interesting and sympathetic description of the system, based largely on personal visits and conferences. After several introductory chapters which aim to show the high crime rates of American youth, to explain briefly why this age group is so heavily represented in criminality, to describe some clinical types of youthful offenders, and to indicate why our reformatories are inadequate in personnel and policy for the work with which they are charged, the authors survey in brief chapters the outstanding characteristics of the English Borstals—the origin and growth of the Borstal idea; commitment, observation, allocation; general principles of Borstal training; personnel; staff-inmate relationships; the training program; relationships with home and community; the walled Borstals; the open Borstals; the Borstal Association; release and after-care.

In evaluating the Borstal system, the authors point to the objectivity with which its leaders are observing their own work, and utilize the results of several statistical follow-up studies made by the Borstal Association and others to show that, considering the toughness of the human material with which the Borstals have to deal, they appear to be more successful in their rehabilitative work than are our American reformatories. They are not blind to what they regard as some defects in the institutions they have studied, especially the need for more psychotherapy, better social case histories, and a more flexible period of treatment. This last criticism is, of course, to be levelled at the law, rather than at the Borstals operating under it. A final chapter commends the Youth Correction Authority Act recently adopted by the American Law Institute and points out that a state accepting this Act would find no difficulty in utilizing to the fullest all that is good in the Borstal system.

The war has caused great disturbances in the Borstals as in other fields of activities in England. Several of them have been closed, others have been converted to new uses. Most of the trainees are probably learning the responsibilities of citizenship in defense of the nation. There is pathos in the hope that some of the staff of these Borstals expressed to the authors that since "what was once might not be again" as much as possible be salvaged so that "somewhere else, perhaps in the United States, their principles and practice might be reconstituted so that all that they had learned and done would not be forfeited."

We cannot but share this hope, but it would be unfair to assume that we are incapable of developing a more intelligent treatment of youthful offenders without the inspiring examples described by Dr. Healy and Mr. Alper. We have already in our best correctional schools for juvenile offenders models of fine institutional treat-

ment, and the authors mention with approval one American reformatory, that of New Jersey at Annandale, which appears to be in no way inferior to the average Borstal. However, the Borstals have demonstrated one fundamental truth, a truth that cannot be too strongly emphasized and which Emerson expressed in the words, "An institution is but the lengthened shadow of a man." All who have visited and studied the Borstals are agreed that their greatest asset has been their high-minded, intelligent staff composed of persons whose deep and sympathetic insight into the problems of the adolescent and the youth has been actively employed in the unremitting labor of purposeful reconstruction of character. When we have learned that our penal and correctional institutions must be entrusted to such men and women we shall have taken the first step toward the construction of a modern and more effective way of dealing with the imprisoned offender.

THORSTEN SELLIN.

University of Pennsylvania

American State Debts, by B. U. Ratchford, 1941. Durham, N. C.: Duke Univ. Press. Pp. xviii, 629.—Much of the history of American state debt is a history of financial blunder and political plunder. The creation of banks, canals and railroads was the prime purpose of state borrowing during the period 1820-1840, when states first incurred large debts. Poor planning for the railroads, early obsolescence of the canals, and outright mismanagement of the banks left the taxpayers little to show for the bonds which they eventually discharged. State borrowing for railroads from 1845 to 1860 may have been slightly more successful, but some of the obligations then incurred are still represented in the state debts of at least three of the American commonwealths. State borrowing during the Reconstruction period in the South was a means whereby adventurers sought quick wealth through exploitation of a defeated people. Recent borrowings, dating largely from about 1910, have in most instances been more respectable, but not altogether so. Poorly managed and dishonest bond issues have characterized the political life of more than one American state in the last few years, and have left their heavy mark upon the lives of taxpaying generations yet to be born.

Professor Ratchford's book draws a dark picture of the origins and management of state indebtedness in America. Yet no one could call his work a piece of muckraking literature. Rather, it is a scholarly, sometimes statistical, always readable, history and analysis of the financial obligations of the states, the reasons why and the manner in which these obligations were incurred, what happened to the money, and how the loans were paid off, refunded, or thoughtfully forgotten.

The book points out that nearly one-half of all state debts incurred since 1900 have been for the purpose of building roads and bridges, and these borrowings are traced and explained, both for states which administered their borrowings wisely, and those which did not. Borrowings for World War veterans' bonuses and pensions, for the maintenance of rural credit systems which in almost every instance failed dismally, for unemployment relief, for construction of local improvements, and for refunding current indebtedness, are all separately discussed, and shown to make up the principal objects for which recent bonded indebtedness has been incurred. There are chapters on "Arkansas, a State That Borrowed Too Much" and "The Tennessee Debt: A Case Study in [bad] Debt Administration." The history of some particular bond issues in other states is traced from beginning to end. There is a short study of the efficacy of available legal remedies for compelling states to abide by the promises they have made. The effect of state constitutional limitations on permissible indebtedness is also dealt with. Finally, there is a statement of basic principles that ought to govern sound state borrowing. To this reviewer, at least, the principles appear to be excellent ones, in the sense that many of our states and of our investors in state bonds would be much better off if the principles were followed.

The book would, however, make hard reading for most professional politicians. Because it deals with the long-range facts of public finance, it will not appeal to public servants whose major interest lies in spending the money regardless of where it comes from. Its readers are rather apt to be limited to public administrators and students of public administration who view the business of government as a continuing process which goes beyond next year's election, a process which is designed to maintain decent state governments for the benefit of those who will be living here five, ten, or two-score years from now.

ROBERT A. LEFLAR.

Fayetteville, Ark.

BOOKS RECEIVED

THE INDEPENDENT REGULATORY COMMISSIONS, by Robert E. Cushman. 1941. New York: Oxford University Press. Pp. xiv, 780. Price $5.00.

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TRAUMA AND DISEASE. Edited by Leopold Brahdy and Samuel Kahn. 1941. Philadelphia: Lea & Febiger. Pp. 655. Price $7.50.

DOMINION OF CANADA INCOME WAR TAX ACT, Including Excess Profits Tax and Other Related Measures, 1941 Edition. Chicago: Commerce Clearing House. Price: $1.00.

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THE QUEST FOR LAW, by William Seagle. 1941. New York: Alfred A. Knopf. Pp. xv, 439, xvii. Price $5.00.

A B C OF THE WOOL PRODUCTS LABELING ACT OF 1939, by Jacob S. Spiro. 1941. New York: Central Book Company. Pp. 39. Price $1.00. Paper bound.

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GIST OF THE FAIR LABOR STANDARDS ACT: A Ready Working Manual of the Federal Wage and Hour Law Containing Text of the Law, Explanatory Notes, Etc., by Jacob S. Spiro and John Milton. 1941. New York: Central Book Company. Pp. 158. Price $1.50. Paper bound.

MILITARY LAW AND COURT MARTIAL PROCEDURE (United States Army Officers' Handbook), by F. Granville Munson and Walter H. E. Jaeger. 1941. Washington: National Law Book Co. Price $1.50.

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AMERICAN BAR ASSOCIATION JOVRNAL

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MANAGING EDITOR

URBAN A. LAVERY, 1140 N. Dearborn St. ..... Chicago, Ill.

Constitution Day

ON the seventeenth day of September the people of the United States celebrated the birthday of the Constitution. It is *their* Constitution. It began with them,—"We, the people of the United States . . . do ordain and establish this Constitution,"—and it lives in their life, and can die only with the death of public spirit in the country. Lawyers study and expound the Constitution, but it is strong only as the people are strong, and it is the people who must look to it that our great charter of liberties shall be unimpaired.

For liberty is the purpose of the compact. All other good things are to follow from that. There is a dedication to liberty, a proffer of life itself if need shall be, a full acceptance of all the daily sacrifices which alone make liberty sure. "Self-reverence, self-knowledge, self-control, These three alone lead life to sovereign power." The American people are free because they have schooled themselves to act according to law. It is a hard-learned lesson, wrung from the experience of centuries, illumined by some filtering through of light from above. The high places among nations, as among men, are won by those who have disciplined themselves. The meek shall inherit the earth.

It is the lawless who are unfree. The rise of a people in the scale of civilization may be measured by their self-restraint in the use of power. It is not a matter of words. Other countries have adopted constitutions modelled on ours, but they remain despotisms. The constitutional machinery will not work of itself. It requires intelligent, educated, farsighted citizens with an ultimate base of moral purpose, a belief in the democratic plan, a deep resolve to make it work. This is the American way of life.

We do well to observe Constitution Day. It is a solemn confession of faith, a public declaration that we, the people of the United States, are of the same mind as when we set the seal on our draft of a fundamental law, that we stand, and will forever stand, on the firm ground of liberty under the law.

Improving the Administration of Justice

The report of the Special Committee on Improving the Administration of Justice (pp. 118-131 Advance Program) should be intently read and considered by every one interested in that subject.

That committee under the leadership of its distinguished chairman, Judge John J. Parker, has had the aid of the Junior Bar Conference, and has also been greatly aided by cooperation with affiliated committees from various state bar organizations meeting in the various judicial circuits. The last of those meetings was held at Dallas, Texas, July 5, 1941.

The discussion was centered on the return to the judicial department of its ancient power to regulate its own procedure. The legislature of Texas has recently given that power to its Supreme Court, and that court has promulgated rules of civil practice which went into effect September first. In another column may be found the address of Gordon Simpson, the president of the State Bar of Texas and excerpts from an address by Circuit Judge Joseph C. Hutcheson, Jr., of the Fifth Circuit.

The Texas Bar is to be congratulated on this great accomplishment. It deserves more extended comment than the limited space which our editorial pages permit. The notable features of those addresses and of the discussion at that "Open Forum" is the unanimous approval of the principle that the courts are best qualified to prescribe the methods of conducting litigation. While due credit was given to the Texas legislature for many admirable provisions of the Texas Civil Code, emphasis was laid upon the fact that legislative action was of necessity hampered by the volume of its other business and that a consistent and thorough-going plan could best be worked out by those directly charged with the duty of the administration of justice.

As might have been expected, there were differences of opinion as to the extent to which the state practice should be assimilated to the new Federal Rules of Civil Procedure, but it was made clear that the Texas rules had closely assimilated the practice of its courts to the provisions of the federal rules and that there was no conflict in spirit, between any of the Texas rules and the federal model.

Uniformity in the methods of the administration of justice is recognized as a prime desideratum but uniformity must yield when it comes in conflict with special conditions requiring treatment appropriate for those conditions.

There is a great movement on foot for the assimilation of state procedure to the Federal pattern and it is making surprising headway.

Our Guests from Abroad

This country inherited its system of law from England and notwithstanding the war in which the colonists became a free and independent nation, the founding fathers had the good sense to continue their adherence to the common law.

In recognition of the fundamental unity of English and American law the American Bar Association has always welcomed with genuine regard the presence at its annual meeting of the great figures of the bench and bar of Great Britain and Ireland. Among others there come to our memory these names: of Lord Chancellors of Great Britain, Lord Haldane, Lord Birkenhead, and Lord Buckmaster; of Lord Chief Justices of England, Lord Russell of Killowen, Lord Hewart, and the Marquis of Reading; of judicial members of the House of Lords, Lord Shaw of Dumferline, Lord Dunedin, Lord Macmillan, and Lord Tomlin; Sir John Simon, then Attorney-General, afterwards Lord Chancellor; James Bryce, then British Ambassador to the United States; Hugh Kennedy, Chief Justice of the Irish Free State; and Sir Frederick Pollock.

Across our northern boundary dwell those with whom we have maintained the happy relationship of friendly neighbors. The Dominion of Canada unites descendants of Great Britain and France. Distinguished men of both of these blood lines have been frequent guests of honor; among them may be recalled Sir William R. Kennedy, a Canadian High Court Judge, Sir Charles Fitzpatrick, Chief Justice of Canada, George H. Montgomery, Batonnier of the Montreal Bar, and Newton W. Rowell, President of the Canadian Bar Association.

Great men of the French Bar have honored our assemblies. One recalls M. Henry M. Aubepin and M. Manuel Fourcade, Batonniers of the Paris Bar, M. Henri Decugis, M. Fernand Payen, and M. Paul Reynaud, former French Minister of Justice.

It is therefore only in the normal course of events that at the coming meeting of our Association the members of the American Bar may welcome the presence of their professional brethren from the British and Canadian Bars. Unhappily, it is this year impossible for the French Bar to be represented. The nation which has always been so closely bound to the United States of America lies prostrate under the invader's heel. Perhaps it may be literally true that there is today no French Bar, or at least that its power has been taken away and its independence removed.

Those who will speak at our meeting are Sir Norman Birkett, a distinguished barrister, D. L. McCarthy, retiring President of the Canadian Bar Association, John G. Foster, a member of the Inner Temple, now serving at Washington as the legal adviser of the British Embassy, who will speak before the Insurance Section on "British Insurance and Wartime Economy," and Pierre Casgrain, Secretary of State for Canada.

In addition, there is a notable representation of distinguished lawyers from the South American Republics, who will speak at the Assembly and at the sessions of the Section on International and Comparative law, and participate in the Symposium on Hemispheric Solidarity.

To greet these representatives from the lawyers of the Democratic Nations, the members of the American Bar Association will strive to equal the famous hospitality of our Latin American brethren.

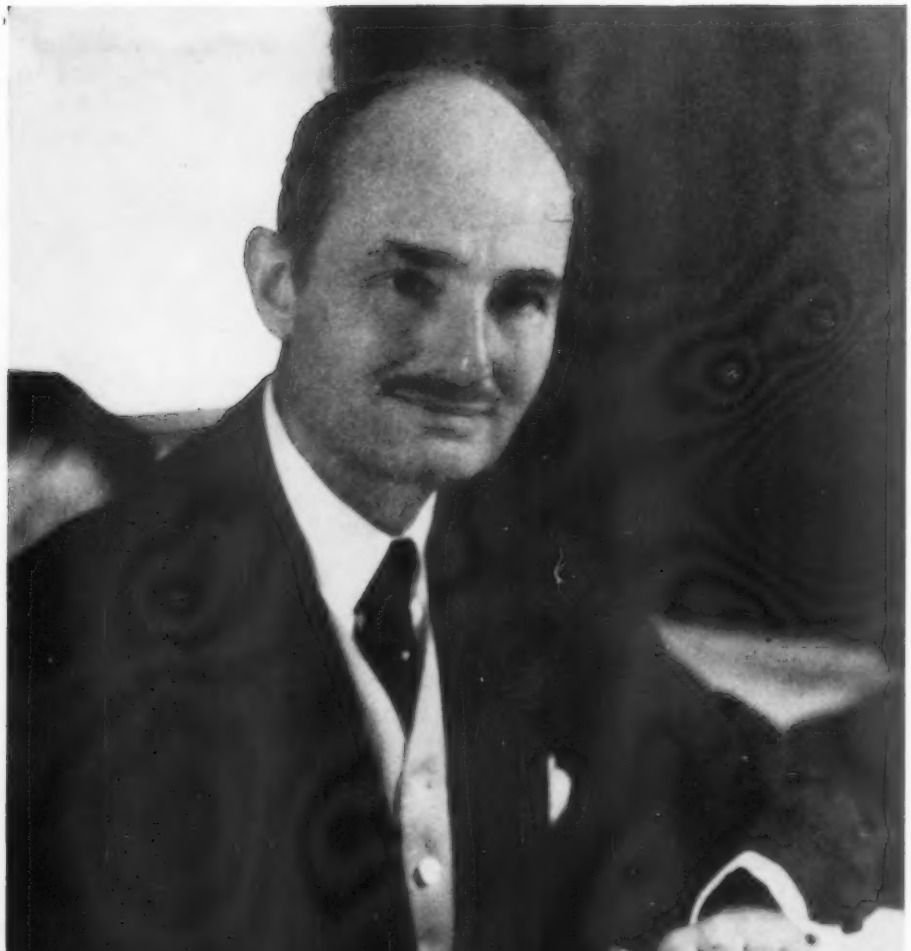
National Defense

The activities of our Committee on National Defense have demonstrated that the lawyer is not only willing but eager to play his part in the preservation of the American way of life, which has been so gravely threatened in the conflict going on between the forces of the dictator nations and the democracies.

Under the leadership of Edmund Ruffin Beckwith, chairman of that committee, a nation-wide organization has been perfected. The Junior Bar Conference has cooperated in that plan with energy and devotion.

The report of the committee appears in the Advance Program on pages 160-164. It shows that through the organization of lawyers' committees on National Defense in every state, legal advice and service has been made available for the Selective Service Boards and for every member of the armed forces of the United States and their dependents, including those selected for military training. The committee has established cooperation with the military and naval authorities and has prepared for the selective service a "Manual of Law." It has devoted itself unstintingly to the uplifting of the national morale. What this Committee, the Junior Bar Conference, and the associated state committees on National Defense have been doing during the present emergency without compensation or hope of reward, should be a conclusive demonstration that to the men of our profession, duty outweighs the profit motive.

We are facing new perils and a new year of activity in National Defense. Day by day the situation grows more serious. There is almost universal desire that America may be able to keep out of armed conflict, that it may not be compelled to send its youth to fight in other lands, but this question is not one which can be decided solely by our desires. The United States may be plunged into war at any moment if the dictator nations deem it to be to their advantage. It is therefore evident that the coming year will be one of intensified effort on the part of the legal profession and its organized representative, the American Bar Association, in the cause of National Defense. The lawyer may be relied upon to play his part in the coming struggle.



Attorney General FRANCIS BIDDLE

ON the 26th day of September, 1789, Edmund Randolph was appointed by President Washington, to be the first Attorney General of the United States.

One hundred and fifty-two years later, August 25, 1941, Francis Biddle, the great, great grandson of Edmund Randolph, was nominated by President Roosevelt to be the fifty-eighth Attorney General of the United States. On September 5, the Senate confirmed the nomination and Judge Biddle entered upon the duties of the office first held by his great, great grandfather, more than a century and a half ago.

After his graduation from Harvard College (A.B. *cum laude*, 1909) and Harvard Law School (LL.D. *cum laude*, 1911) Francis Biddle served as private secretary to Justice Oliver Wendell Holmes. In 1912 he began the practice of law in Philadelphia and continued in general practice there, until 1934. In that year he was appointed chairman of the National Labor Relations Board. In 1938 and 1939 he was appointed chief counsel of the Joint Congressional Committee created to investigate the Tennessee Valley Authority. In 1939 he was made United States Circuit Judge for the Third Judicial Circuit but was called from that post in 1940 to become Solicitor General. He served in that important position until his recent appointment as Attorney General.

Attorney General Biddle is scheduled to address the Annual Meeting at Indianapolis on Monday, September 29.

CURRENT LEGAL PERIODICALS

By KENNETH C. SEARS

Professor of Law, University of Chicago

Administrative Law

"Substantial Evidence" In Administrative Law, by E. Blythe Stason, in 89 University of Pennsylvania L. Rev. 1026. (June, 1941.)

After a discussion concerning the statutory provisions involving the "substantial evidence" rule, and the importance of the rule, consideration is given to the possible meanings of the term. Here is the meaning favored by Dean Stason: "the term 'substantial evidence' should be construed to confer finality upon an administrative decision on the facts when, upon an examination of the entire record, the evidence, including the inferences therefrom, is found to be such that a reasonable man, acting reasonably, *might* have reached the decision; but, on the other hand, if a reasonable man, acting reasonably, *could not* have reached the decision from the evidence and its inferences then the decision is not supported by substantial evidence and it should be set aside." This is in accord with the prevailing rule in jury trials relative to the direction of verdicts, as distinguished from the discretionary power of trial courts to set aside verdicts which are contrary to the evidence. It is also in accord with the prevailing rule applied by appellate courts in setting aside verdicts of juries. This meaning of substantial evidence is thought to have been the intention of Congress when the Federal Trade Commission Act was passed. Many court opinions announce the same point of view. But the author is concerned about the recent opinions in the Waterman Steamship Corporation and the Bradford Dyeing Association cases. Two exceptions are taken. (1) The quest seems to have been for some evidence in favor of the decision of the Labor Board which could be called "substantial" without making an effort to examine the entire record with a view of determining whether the Board's decision was so contrary to the entire evidence that it could not have been reached by "a reasonable board acting reasonably." (2) The Supreme Court indicated that the requirement of substantial evidence governed only the determination of the underlying facts and not to the ultimate conclusions of facts to be drawn from the underlying facts.

Constitutional Law

The President, Congress, And Foreign Relations, by Harry Willmer Jones, in 29 California L. Rev. 565. (July, 1941.)

After considering the legislative leadership of the President, attention is directed to the "inherent executive powers" of the President over foreign affairs. These are considered in connection with the power vested in Congress to declare war. What is the result? (1) The argument that the President lacks the authority to use the armed forces in a manner that would amount to an act of war clashes with the fact that there are instances where the President has made use of the armed forces upon his own responsibility. Consider this example. The House of Representatives censured President Polk by declaring that the War with Mexico was "unnecessarily and unconstitutionally begun by the President." Lincoln voted for this resolution of censure. Later Lincoln as President asserted his power as Commander in Chief further than any other president. (2) A further difficulty is that there seems "to be no realistic standard, under present conditions of international affairs, by which it can be stated, with any degree of assurance, just what does amount to an act of war." (3) Despite the difficulty of knowing what power the President has as Commander in Chief, logically, this power seems not to be subject to Congressional direction or interference. This appears to have been recognized in Congress during the debate over the Lease-Lend Bill, concerning the power to convoy. (4) "It must be kept in mind that these constitutional issues, by their very nature, are normally non-justiciable, and that the precedents by which executive action is to be judged are chiefly historical or political, not judicial, precedents."

Constitutional Law

Constitutional Protection Of The Alien's Right to Work, by Basil O'Connor, in 18 New York University L. Qu. Rev. 483. (May, 1941.)

In a very satisfactory discussion of the constitutional protection of an alien's right to work, the author predicts that the subject is probably due for considerable attention in the future. This, because relatively little has been decided upon this subject by the United States Supreme Court. In general its attitude has been friendly to protection for the alien. Cases concerning hunting, fishing, and working for a state or a subdivision thereof are regarded as doubtful exceptions to its usual attitude. But other courts have sometimes shown too much tolerance for legislative discrimination against aliens. The oft repeated presumption in favor of the constitutionality of legislation tends, at least, to justify many of these decisions. "There was a time not long ago when the Supreme Court would strike down legislation when it was not in agreement with the Court's idea of wisdom

or policy. We have come a long way from that concept of the Court's function. The attitude of the present Court is to give the legislature full sway and the benefit of all doubts. Legislation nullified as repugnant to the Fourteenth Amendment today has to be patently irrational." The author avoids this barrier very neatly in this fashion: (1) "the exclusion of an alien from his chosen occupation is a deprivation of a civil liberty" and (2) "recent decisions have indicated that the same presumption of constitutionality does not apply in civil liberties cases as in cases involving the deprivation of mere economic rights." So, our author calls upon the courts to take a firm stand and hold that an alien "may not be excluded from any employment unless the fact of his alienage bears some relationship to the excluded employment which adversely affects the public." Also he argues that in determining this question courts are not required to believe the unbelievable and also that: "If the constitutional principles are agreed upon, the motive for the legislation should be considered in measuring its validity."

Constitutional Law

Political Practice And The Constitution, by Charles Warren, in 89 University of Pennsylvania L. Rev. 1003. (June, 1941.)

The thesis is this: "The course of American history and politics has, at times, been as strongly influenced by a practice under the Constitution as by a judicial decision." The chief illustration of this thesis in this article is the series of events whereby the terms of the President and members of Congress were extended from midnight of March 3 to noon of March 4. The Constitution has no provision on this point, merely providing for the length of the term. Even the date when the Constitution should become effective was fixed, not by the Convention, but by the Continental Congress as the first Wednesday in March, 1789. This day was the fourth of March. "For thirty years, it was tacitly assumed that, as a matter of constitutional law, the Presidential term ended at midnight on March 3, and that the Congress came to an end at the same hour and on the same date." This practice was aided by a recently revealed letter from Chief Justice Marshall for the Supreme Court to the Secretary of State. The letter appears to be an informal advisory opinion. But both houses of Congress began to tinker with the clock and gradually under the pressure of business and filibusters the custom changed so that Congress continued to transact business until noon of March 4. This change gradually received official recognition until in 1909, for the first time, in the Statutes At Large Acts of Congress were stated to have been enacted on March 4. Now the Twentieth Amendment provides that the terms of the President and Vice President shall end at noon on January 20, and those of the members of Congress at noon on January 3; "and the terms of their successors shall then begin."

Judicial Selection

The Appointment of Supreme Court Justices: III, by John P. Frank, in 1941 Wisconsin L. Rev. 461. (July, 1941.)

"The first representative of the New Freedom was to be the last apostle of the Old Deal on the Supreme Court. Hence the great mystery of James Clark McReynolds is how he ever came to be a Justice in the first place. Woodrow Wilson sincerely desired to put liberals on the Court, and the choices of John H. Clarke and Louis D. Brandeis mark two great successes in this attempt. Yet, perhaps by confusing a zeal for anti-trust law enforcement with liberalism, Wilson managed to choose the most conservative justice since Stephen J. Field." Thus opens the final installment of Mr. Frank's interesting article. He gives consideration to the remaining appointments but the Department of Justice refused to furnish him the files on those who were still alive in 1939. When ex-President Taft was suggested to President Wilson, organized labor made its protest. But during "normalcy" the spirit of the age seems to have stilled this objection, "for to an amazing extent Taft in 1921 was the choice of all America." How surprising it is, then, to read the protest of Federal Judge Charles F. Amidon of North Dakota. Was the distressed wheat belt speaking? "The Court ought not to be made up of Pharisees concerned with its traditions, but of living, free prophets charged with the great duty of interpreting the Constitution and applying it to American life in such a way as to make it a blessing and not a blight. . . . A young man should be chosen, certainly under fifty, and better if he is near forty. He ought to come to the Court with a powerful mind untrammeled by its traditions. . . . If such a man disturbs the Court, that will show it needs disturbing." Arise, Judge Amidon, from your sepulcher and take a bow! A large amount of space is devoted to Justice Butler. The failure of the sharp fight against his confirmation is best explained in this manner: "In 1922 conservatism was a ladder, not a barrier, to the Supreme Court." Senator Norris opposed the confirmation of Justice Stone but he has lived to acknowledge his error. This is one time that Senator Borah was correct; for he stated: "He (Stone) is not only a man of extraordinary ability, but he is a man of liberal mind and of a high sense of public duty." The sharp fight against Chief Justice Hughes and the rejection of Judge Parker led President Hoover to listen to Senator Borah and other Senate liberals who insisted upon Justice Cardozo as a successor to Justice Holmes. Under the New Deal, President Roosevelt "has satisfied himself that his selections support the New Deal down to the last experiment." Socialist Norman Thomas apparently feared Justice Black and asked for an inquiry that would have aroused antagonism and perhaps would have caused his rejection. The National Association for the Advancement of Colored People took even stronger action. Both are probably satisfied with Justice Black's per-

formance. The behavior pattern of our Presidents in making nominations is reasonably clear. They have seldom failed in knowing their men. Chase, McReynolds, and Stone have been the three exceptions since 1864. Curiously enough, all of them were cabinet members. But the behavior patterns of the Senate seem erratic. The rejection of Judge Parker is the only instance since 1894. Accordingly, "In modern times the confirmation process has become of diminishing significance."

Public Policy

Restraints Upon Individual Freedom In Times of National Emergency, by John Lord O'Brian, in 26 Cornell L. Qu. 523. (June, 1941.)

Mindful of the warning of John Stuart Mill that one of the most harmful illusions afflicting mankind is the belief that the triumph of truth is inevitable, the author contrasts our experience in the "Great War" with our present international problems. Here are a few noteworthy points (1) Love of justice is common to mankind generally and to all systems of law. The difference in peoples is in the self-control which, as Lord Bryce said, "prevents emotional impulses from overriding justice." (2) It is a vagary that the United States entered the "Great War" chiefly because of the machinations of munitions makers, international bankers, and sentimentalists generally." (3) "Much valuable information on enemy activities was gained at that time through wire tapping. Wire tapping was not a general practice. Its use was limited, but the results were highly important." (4) The problem of the conscientious objector was greatly exaggerated. Of nearly 3,000,000 inducted into the Army only about 4,000 claimed exemption from all military service and only about 500 refused to render any form of military service. (5) On the difficult problem of freedom of speech the Supreme Court has made a record in line "with the great tradition which had its origin in England in the Seventeenth Century. It is a record singularly free from prejudice, pettiness, and partisanship." (6) "But this freedom is not inconsistent with the right of the nation in time of grave national danger to protect itself against utterances intended to weaken its power of self defense. However fine the boundary line of limitation may seem at times, the distinction is there and it is valid. In such times we have earnest warnings against increasing the power of the State. Many fear that any restraint will lead inevitably to lasting conditions of despotism and tyranny. Despite the painful history of reconstruction years after the Civil War and the last war, no such result came about."

National Bar Journal

THE National Bar Association, an organization of Negro lawyers, on July 15th published the first number of its journal. The most impressive feature of this creditable publication is its consciousness of race and color. This theme appears in nearly every article. Observe these quotations from the several articles.

"Just so long as we are compelled to recognize racial attitudes in America, and the positive refusal to admit the Negro lawyer to membership in the Bar Associations of the South or even to permit them to use their libraries, just so long as the Negro lawyer is restricted in his membership in local Bar Associations in the North, and particularly, so long as the American Bar Association for all practical purposes refuses to admit Negroes to membership, then so long must there be an organization such as the National Bar Association. Certainly all of us shall welcome the day when racial animosities and class lines shall be so obliterated that separate Bar Associations, other separate professional associations as well as separate schools will be anachronisms." . . .

"It appears from the attitude of the American Federation of Labor and the great Brotherhoods of Railroad Workers that the spirit of exclusion, prejudice and hatred is today actually growing progressively worse. And this unbrotherly, un-American and abhorrent practice of racial prejudice has caused the Negro artisans to lose ground upon the Labor Front everywhere within our Democracy, which causes us to wonder, where are the Negro barbers, plasterers, brickmasons, carpenters, chefs, bakers, paper hangers, interior decorators, painters, linesmen with the Western Union Telegraph Company and railroad firemen and brakemen?" . . .

"The colored lawyer has done a great work for his race, but he cannot continue to fight cases involving our civil rights alone, for there is little or no remuneration in them. The more lucrative cases they handle, the more time they will have to fight these race battles. The sooner Negroes realize that every time they retain a colored lawyer and pay him a fee, they are paying a premium on their civil rights insurance, the sooner we will get justice and equality of opportunity." . . .

Also worthy of thought is this forthright editorial note entitled: "A Liberal Supreme Court":

"The Supreme Court of the United States as now constituted is a truly liberal tribunal. For the first time since its establishment under the Constitution, the Court has taken a liberal attitude in its interpretation of our constitutional guarantees and we have been advanced in the enjoyment of our fundamental rights.

The Negroes as a whole had and felt some foreboding in the appointment of Justice Black of Alabama, but his liberal decisions affecting Negroes have marked mile stones in safeguarding our constitutional rights; we have accepted him as one of our fairest jurists. Democracy can now have a meaning." . . .

"We hail with delight the elevation of Justice Harlan Fiske Stone to be Chief Justice of the Supreme Court; his great legal ability gained from long years of experience added to his sixteen years on the bench preeminently fit him to be Chief Justice; he will easily take his place along with that great legal scholar, retiring Chief Justice Charles Evans Hughes, America's premier lawyer and statesman."

THE AMERICAN WAY OF LIFE

By HON. R. W. SHARKEY

Judge of Civil Court, Florence, South Carolina

THERE is no single word—there is no single definition—that may adequately describe or define "Our American Way of Life." We call it "democracy," and we sometimes refer to it as "liberty" or "freedom." We can sense its significance, perhaps, better than we can precisely define its meaning.

But suppose, for a few minutes, we try to be a little more realistic, and a little more specific. We call this way of life Democracy. Democracy is self-government, and self-government is religious, political, and economic freedom. Under this government we worship as we wish, we vote as we wish, and there is no limit to our right to material accomplishments, so long as we respect the rights of others. These blessings are ours to enjoy, not *primarily* because we have earned the right to enjoy them, and not so much because we deserve the privileges they confer upon us, they are ours because they have been given to us. They are something we have *always* had. They are things we have always taken for granted —and which, in taking for granted, we have frequently neglected and abused. And here's something we're likely to forget. Our way of living is like anything else that is inherited—some one had to work and fight for it in the beginning; and it is something we may conceivably lose if we fail to protect and preserve it.

I am going to preface my remaining brief comments with two statements that on their face are flatly contradictory.

First:—Democracy—which we call our way of life—is the *ideal* form of government.

Second:—There is *no* ideal form of government.

Apparently, those two statements can't be reconciled, and yet, they are both true.

The first statement—that democracy is the ideal form of government—is true, but it is true only as an ideal—and not as a practical fact. It is ideal and true only in the abstract and in theory.

The second statement—that there is *no* ideal form of government—is likewise true, but *it* is true in its relation to practical experience. This is so because *any* theory of government (democracy or what not) if it is to be translated into actual practice, must be framed out of existing human nature, and the defects and the vagaries of human nature—its greed and selfishness and pride of life,—will in any scheme of government surely generate their attendant evils. This is always reflected, in all government, in the avarice, indifference and ignorance of so many citizens, and it finally results in inefficiency, economic waste and moral corruption on the part of both the citizenship and government officials, both high and low. There will always be the redeeming feature, in any form of government, of the presence of some citizens and some public officials who are both able and conscientious. But we know that the evils of which we speak, in the administration of governmental affairs, do exist, and often flourish in a democracy and that they are always traceable directly to the people themselves. We also know that the only cure for such evils rests in the intelligence and honesty of the people. The ideals of the democratic way of life will be realized only to the extent that the people preach and practice, with sincerity and diligence, the principles upon which this government was in the beginning established.

Self-government is the most delicate mechanism ever placed in the hands of man, and at the same time the most difficult to operate successfully. It was with us in America a great experiment. It has encountered many difficulties, and has withstood assaults both from within and without. It has survived thus far, but there are many of its benefits that we of this generation have done little to deserve, and whether it will finally survive will depend very much upon whether we practice more diligently and faithfully the principles of living upon which it is founded. More than 13 years before our constitution was adopted, the Assembly of the Colony of Virginia adopted this resolution: "No free government, or the blessings of liberty can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality and virtue, and by a frequent recurrence to fundamental principles." We have wandered rather far afield from some of these principles. Certainly we can profit greatly if we will put those principles to work, and compare our actions *now* to those standards. They constitute the cornerstone of the American way of life that our forefathers laid.

Our way of life may be endangered by the menacing forces of the so-called new order, fostered by Hitler and his kind, and based on the doctrine that might makes right, but I do not believe that it will ever be destroyed, alone, by these or any other forces from without. A greater and more subtle danger lies within our own borders and within ourselves, in the form of mass selfishness and indifference.

We need to refer to the principles that made us a great nation, and to repent of our political indifference. They alone can insure the sacredness of the home and the stability of the governmental structure. The elemental human qualities of truth, sincerity and simplicity are just as fundamental in the life of the state, as they are in the life of the individual, and there is no place more fitting in which to commence the teaching and the living of these principles, than in the American home.

WHY YOU SHOULD COME TO INDIANAPOLIS

SOON after this issue of the JOURNAL comes to the desks of its many readers, lawyers in all parts of the country will be making their final preparations to leave for Indianapolis to attend the sixty-fourth Annual Meeting of the great National organization of the Bar and to gain the undoubted zest, encouragement and practical help which come from spending a week as a part of such an assembly of members of the profession.

If this article comes to your attention soon after it is received, you are reminded that it still is not too late for you to decide to come to the meeting, by train, plane, or motor, for all or part of the sessions. This is peculiarly a year when you ought to come if you can, a year when you will get a great deal out of the meeting if you can and do come. Hotel reservations are available on telegraphed request to the Reservation Department of the Association, Claypool Hotel, Indianapolis. You will not be sorry if you leave your desk for a few days and join the ranks of those who are trying to do sensibly their part in furthering the common interests of your profession and our country.

Indianapolis is fortunately situated, to permit such last-minute decisions to come. It is not far from the supposititious center of population of the country and is not far from the center which would be located by a like computation as to the membership of the Association. Its geographical location is central, and it has unusual facilities for quick and convenient access by railroads, airplanes, or motor highways. It is famed for hospitality to visitors within its gates, and for the friendliness and diligence of its competent Bar.

This Annual Meeting will be held in one of the teeming, attractive cities of the Middle West. Indianapolis is not as large as some of the cities in which the Association has lately met in normal years. Under existing conditions in the country and the world, the 1941 meeting will not be one of the Association's largest, but it is no secret in Association affairs that many of its most thoroughly enjoyable and worth-while meetings have been those convened in relatively smaller cities of the country —Memphis, Grand Rapids, Milwaukee, Seattle, Salt Lake City, Buffalo, to mention only a few. In such a city an annual meeting of the American Bar Association is an outstanding and memorable event, which the whole community hails and puts forth its best. This year's meeting in Indianapolis will be no exception. The Board of Governors felt that it was fortunate that the Association could accept the cordial invitation of the hospitable lawyers of Indianapolis and the Hoosier State. Within the memory of many lawyers still living, the leader of the Indianapolis Bar was President of the United States, in the person of Benjamin Harrison. Still later, Charles W. Fairbanks and Thomas Marshall, from the ranks of Indiana lawyers, were Vice Presidents of the United States.

The lawyers who come to Indianapolis will find themselves in the heart of a great area which is alive and vibrant with production, preparation and training for National defense. The whole scene is heartening, as well as appropriate for the 1941 meeting of a great profession which, from the first, has been putting forth its best efforts to do its part in aid of defense, in the Nation, the States, and the home communities. The Middle West is well worth seeing now, by those who are anxious for the future of their country and the defense of law-governed institutions.

Many of the sessions—in fact, the whole meeting—should be inspiriting as well as most interesting. The programs for the general sessions and the Sections, the reports of the Committees, the matters submitted for discussion and action, are shot through with the atmosphere of the National emergency and the patriotic purpose of American lawyers to do their full part in coping with the problems which have legal aspects. Distinction will be added to the meeting by the fortunate presence of Sir Norman Birkett, K. C., one of the most illustrious of the British lawyers in the war period, who has been a gifted member of Parliament, who is an outstanding spokesman for his country and its lawyers, in these days when the historic citadels of the profession of law have been ravaged and brought to ruin. The program builders for this meeting have wisely returned to the custom of a really distinguished Wednesday evening session, at which the speaker will be Sir Norman Birkett. Mr. Justice Robert H. Jackson of the Supreme Court of the United States speaks at the annual dinner. Long an active member of the American Bar Association and a member of its House of Delegates successively as Solicitor General and Attorney General, the new member of the Nation's great Court has held the friendship of Association members, despite disagreements as to policies; and his utterances from his new post of honor and vantage will be heard with keen interest.

As delegate from the Bar Association of our sister democracy to the North comes again the genial and beloved D. L. McCarthy, K. C., retiring President of the Canadian Bar Association from the time of Canada's entrance into the second World War. He made a host of friends in Philadelphia last summer, and he will be welcomed as an old and beloved friend, as his presence betokens the closer ties between Canada and the United States, in their common defense of the law.

The most stirring and impressive thing about an Annual Meeting of the American Bar Association is

probably its visible demonstration that in a shifting war-troubled world, when law seems so largely imperilled by force and by innovation, a great body of American lawyers are holding fast to the faith and are giving freely of their time and abilities to help preserve the fundamentals of the law-governed American way of life. Anyone gains as a citizen who takes part in such a gathering.

Probably the average member who comes to an Association meeting for the first time experiences some sense of bewilderment and uncertainty as to what he should do at particular times, when so many different events are taking place simultaneously. He has a feeling that the meeting is split into many, perhaps too many cubicles; and that if he goes to any one session he misses several others which he would like to attend. Upon fuller familiarity with the routines and habits of the experienced convention-goers, any such sense of bewilderment soon vanishes.

The basic principle underlying the structure of Annual Meetings of the Association is that at appropriate times the whole attendance is brought together on occasions of general interest, while at other times the attendance voluntarily divides itself, according to individual choice, into Section meetings and forums devoted to the specialized and helpful discussion of subjects of particular interest to those attending. A rich choice is thus offered; fortunate indeed is the member who finds no conflicts between Section sessions he would like to attend. The wise man is he who joins all of the Sections in which he is interested and thereby obtains from each copies of the reports, addresses, and proceedings, which are sent to him. Then he may, without sense of deprivation, attend whatever session seems likely to interest and benefit him most, realizing that as to the others he may read, if not hear.

From such a pattern or plan, the comprehensive Annual Program seems not nearly so complicated or bewildering. Every member should of course be on hand for the great opening session on Monday morning, September 29. This is always an impressive scene. The democratic proc[illegible] of the Association get quickly under way. Resolutions are offered from the floor, by any member, for open hearings before the Resolutions Committee and later debate and action on the floor of the Assembly, made up of all of the members in attendance. The Chairman of the Resolutions Committee this year is the beloved and distinguished Chairman of the Judiciary Committee of the National House of Representatives, the Honorable Hatton W. Sumners, of Texas.

The annual address of the President of the Association, this year the Honorable Jacob M. Lashly, of St. Louis, also distinguishes the opening session. Nominations for Assembly Delegates are made from the floor, to be voted on at the next session of the Assembly, which takes place Wednesday morning.

Monday afternoon and all day Tuesday are devoted to sessions of the Sections and to Committee forums. Here the average member may experience difficulty in making his choice, as the attractive features are many and varied. No one will be unable to find a congenial and worthwhile group to join.

On Monday afternoon, the representative House of Delegates begins the consideration of its formidable and important calendar. With the Assembly, the House of Delegates makes up the Association's bi-cameral system, to assure representative and deliberative action in behalf of the organized Bar of the whole country. Represented in the House of Delegates by delegates of their own choosing at home in the states are a large majority of American lawyers. About one-third of the members of the House have been nominated by petition and elected by mail ballot, by American Bar Association members, at least one Delegate from each state. No convention visitor should fail to spend considerable time as a welcome spectator of the interesting proceedings of the House of Delegates.

By Wednesday morning the Annual Meeting has gathered full momentum. Everyone comes together again in the Assembly, to elect the four Assembly Delegates and to listen to the distinguished speakers who will contribute to the timely symposium on hemispheric solidarity. The Wednesday evening session, already adverted to, will be followed by the President's reception, which is always a gala social occasion. The Thursday morning session of the Assembly is always replete with lively interest, with the report by the Resolutions Committee and the debate and vote on the resolutions as the chief features.

The climax of the convention comes with the Annual Dinner Thursday evening, made notable by addresses which live in memory. Animated business sessions of the Assembly and House follow on Friday, with the presentation of the incoming officers at a concluding luncheon, at which it has become traditional for the incoming President to make a preliminary statement of his objectives and program.

The program of the Annual Meeting, so far as it had then been determined, was printed in our August and September numbers. The Advance Program Pamphlet has since been mailed to every member. Because it is more complete than the program published in the JOURNAL, it should be examined by all members whether they attend or not, so that all may have the information therein contained and so that those who come may be able better to plan attendance at those sessions in which they are most interested.

If you have not already decided and planned to come to Indianapolis, NOW is a good time to decide and come.

The entertainment program is varied and good. On Monday evening is the Symphony Concert. Numerous sightseeing trips have been provided. Golf players will be welcome at all country clubs.

As in prior years the Junior Bar program is extensive and interesting.

TO POPULARIZE AMERICAN INTERNATIONAL LAW

By JOHN H. WIGMORE

IT is my considered opinion that our Profession of the Bar, as a whole, is no better prepared at present to guide and protect our people in the American legal relations of the coming international period than was our Military Department of a year ago in its preparation for national defense.

Therefore, the Profession needs to prepare itself in the field of American International Law and International Organization.

The un-acquaintance of our modern Bar with even the elements of International Law is lamentable. It is caused chiefly by neglect of that subject at our Law Schools; for none of them require its study, and most of them offer no course of instruction. But there are causes and causes—*causa causans, causa proxima, causa remota,* as St. Thomas Aquinas classified them. The chief *causa causans* of the faculties not requiring or not offering the subject is that the average law student does not willingly take a course labelled International Law. And for his reluctance there are two chief causes. One is that the subject sounds to him foreign-made and therefore relatively negligible. The second and most influential cause is that it does not sound "practical," i.e., does not contain rules likely to arise in practice, and therefore has no status as a bread-winning subject, in contrast to the other subjects of the curriculum.

These two causes likewise account, I infer, for the indifference of the average practitioner to the subject.

It is therefore the purpose of the present screed to help persuade the practitioner that the above attitude is mistaken on both points, i.e. (1) *that International Law is an American subject* and (2) *that it teems and swarms with principles and rules which may arise in ordinary practice at the bar,* and from whose knowledge *a fee may be earned quite as likely as from knowledge of most other subjects of law.* The Syllabus hereafter mentioned is designed to show that fact.

To be sure, little has hitherto been done by the professors and the book-writers to make such a showing. Most of the treatises and case-collections (excepting always that of my distinguished former colleague, Mr. Charles Cheney Hyde, who devoted his book to "International Law, chiefly as Interpreted and Applied by the United States"), intermingle and overcrowd their citations with so many examples from foreign countries and so many titles in foreign languages that often the student would get no impression of the subject having played any notable part in United States practice. The historic cases and incidents recorded throughout our past 150 years of practice are supplanted by cases and incidents from the external world. For example, in the latest book of the kind that has come to my notice —a work of superb and comprehensive scholarship—the 200-odd extracts for study include only some 50 cases from United States judicial opinions; and though there are also some 30 quotations from international arbitration tribunals dealing with United States claims, yet this is offset in large degree by quotations from the Swiss Tribunal at Geneva, the French Court of Appeals at Rouen, the German Reichsgericht, the Supreme Court of Hongkong, and so on. Again, in the same treatise in the chapter on Status and Function of Consuls, although two of the five extracts represent a U. S. A. decision and a U. S. A. treaty, yet none of the five extracts deal with the authority of a foreign consul to intervene in the administration of estates of deceased foreign nationals; which is one of *the* subjects on which our practitioners have earned, and will continue to earn, substantial fees. Again, at the Conference of Teachers of International Law held at Washington in 1914 (15 A.J.I.L. 359), a resolution, recommending strongly the use of concrete cases as material for instruction, went on to urge also (believe it or not!) the study of "treaties . . . of epoch-making congresses, *Westphalia, 1648; Vienna, 1815-23; Paris, 1856, London, 1909,*" thus entirely ignoring the important American treaties and historic episodes which have marked the practical application of international principles in the annals of our own country.

Books of the above authoritative type add luster to our scholarship, and will serve valuably to guide the diplomacy of the Department of State. But they will never serve to stir the interest of the United States practitioner. We have to face an "attitude," as the psychologists call it. The famous epigram of shrewd Vice-President Marshall, a generation ago, when a journalist asked him for his opinion on the national crisis, will be recalled: "What this country most needs" said he, "is a good five-cent cigar!" And to awaken in our practitioners an urge to know the elements of International Law, what is needed is the offer of a book, or collection of materials, which has the simple homely aim to concentrate on *American* (i.e., United States) International Law. Then there will be some hope that our Bar will realize that subject to be one which may earn them some fees in ordinary practice and which therefore demands study and preparation.

Of course there are jurists who repudiate the use of the term *"American* International Law." But that controversy of juristic theory need not obstruct the above proposal. Irrespective of theory, there *is* a *practice* in applying international principles to cases that come before our American tribunals and are dealt with all the time by our Depart-

ment of State. That is the material in which the American practitioner would be interested as relevant to his daily tasks with clients.

And I believe also that he would be interested in discovering how readily he could interpret the meaning of controversial events which are chronicled almost daily in the press. Here are two examples from successive recent days:

> (1) Washington, D. C., July 29, 1941 (Associated Press):
>
> President Roosevelt asserted today that plans for development of the St. Lawrence waterway were being worked out, so that the ultimate rights of New York State would be fully protected. He told reporters that he was in what he termed a perfectly terrible position in the matter, because when he was governor of New York he had contended that the State had title to the bed of the St. Lawrence as far as the middle of the stream. Now, since he is President, the shoe is on the other foot [i.e., because on behalf of the Federal Government he now claims for it the title to the middle of the river-bed], and because of his previous arguments he is precluded from saying the State does not have title. But the matter was being worked out, he indicated, in such a way that the title issue would not arise.

A reference to the citations of § 150 and 152 in the Syllabus, mentioned later, would show the international legal principle which the President had in mind.

> (2) San Francisco, July 31, 1941 (Associated Press):
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> The United States Customs department granted the $15,000,000 Japanese liner *Tatuta Maru* permission to clear port shortly before midnight. But at the last minute . . . suit was filed against the liner. The suit was filed under admiralty law by Arnhold & Co. of New York City, because the firm had failed to get delivery of its portion of the ship's cargo—egg yolks, albumen, and straw braid. R. D. Mackenzie, attorney for the New York firm, said the ship could not sail without posting bond in excess of the amount named in the suit.

Here again the American lawyer who had read some of the Supreme Court opinions cited in § 188 of the Syllabus mentioned later would be able to have an opinion on the validity of the process thus served on the foreign ship in a United States harbor.

Does any elementary work specifically offer the materials of American International Law? It does not, as yet. But that lack need not prevent the American practitioner from starting in to study the subject. All that he needs—if he is willing to become a student again—is a Syllabus of accessible materials. With the Syllabus at hand and the references available in a bar library, he can educate himself by a course of study without a teacher.

What would be those accessible materials?

Chiefly two: (1) The opinions of federal and state courts; (2) the records of diplomatic correspondence of our own Department of State. The former are accessible to all lawyers. The latter are sufficiently accessible in those masterly compilations abstracting the hundred volumes of (so-called) Foreign Relations reports—the collections known as Wharton's Digest (3 volumes, to 1886), Moore's Digest (8 volumes to 1906), and Hackworth's Digest (2 volumes, just started in 1941); all of these being accessible in most bar association libraries (and doubtless being purchasable on the market). There is no more interesting literature in our profession than these diplomatic documents telling the stories of our peaceful controversies with other nations during the past century. Add to the above the articles in the American Journal of International Law, the United States Code, other government publications available on application, chapters in a few modern treatises, and monographs. The practitioner may thus readily equip himself with the principles of American international law and practice as shown in the legislative, judicial, diplomatic, and administrative records.

A Syllabus is now offered to aid the willing practitioner to educate himself by an interesting course of reading.

The Syllabus offered is in four parts: I, International Substantive Common Law; II, International Legislation (Treaties, Multipartite Treaties, International Conferences and Conventions, International Unions, League of Nations); III, International Procedure in Controversies (including War); IV, International Adjudication (including Claims Commissions, Hague Court, World Court).

Part I is now ready in print, Part II in mimeograph will be ready in November. Parts III and IV will be available early in 1942.

Incomplete, of course, is the list of illustrative judicial opinions and other sources cited. A complete digest of American judicial opinions is now in the course of preparation by the American Bar Association's Section on International and Comparative Law; and that Digest will be invaluable in the preparation of briefs. But the Syllabus cites only enough cases under each topic to illustrate the varied application of the principles in practice. The object of the Syllabus is simply to demonstrate to the practitioners of the United States that *virtually every principle of International Law has had applications in our United States practice, and is potential of a fee to be earned by a practitioner.*

Perhaps I should not have ventured to publish anything of the sort in a field of this vast scope, wherein there are and can be but few masters. Far be it from me to assume any status as an expert in it. But I have taught a class in International Law, off and on, during some 50 years, and I have had some experiences with our Department of State, both at home and abroad. (By the way, I once on behalf of certain American residents in Tokyo forwarded to the State Department a complaint which resulted in an instruction to the then American Minister in Japan to reverse his ruling.) And during that period I believe that I have learned something both of the fundamental principles of international law and of the spirit in which it is practically administered.

The widespread lack of interest among our practitioners has been depressing. This Syllabus is offered in the hope that something can be done to remove the two principal causes of that lack of interest.*

*Copies of the 50-page Syllabus, Part I, can be obtained on application by mail to the office of the American Bar Association, 1140 North Dearborn Street, Chicago, enclosing 50 cents to cover cost of printing and postage.

WASHINGTON LETTER

Francis Biddle, Attorney General

CONFIRMATION of Francis Biddle, of Pennsylvania, to be Attorney General of the United States was made September 5th by the Senate without a record vote after his unanimous approval by the Judiciary Committee. A picture of the new Attorney General and some further comment about him appears on another page. One of the difficult problems of balance which the new Attorney General will have is recognized as that of guiding the F.B.I., as well as other agencies of the Department of Justice, in the most effective way to stop subversive activities, without resorting to a "witch-hunting" policy. His reputed fondness and talent for the administrative side of the law will find full scope here for their successful exercise. Washington and the rest of the nation wish him well.

Entry of Aliens—Visas

With national defense now the first consideration, the admission of aliens into the country requires the most careful supervision. Accordingly, the State Department's new procedure in respect to visas has a wide and growing interest. It should be understood that a visa, nowadays, often is a separate instrument of admission as distinguished from a passport. Sometimes the visa is stamped on the passport. But the obtaining of a passport may be impossible, and for other reasons its use may not be feasible by an alien.

The new procedure in respect to visas is based upon the anticipation that the great majority of cases of aliens desiring admission will be initiated by persons in the United States who are interested in sponsoring the admission of alien relatives, friends, or associates. The newly designed printed forms which, when "completely filled out by typewriter," are to be sent to the Visa Division of the Department of State, are not applications for a visa; but serve to prepare the way in the Department for receipt of the visa application, and sometimes to determine whether there is any use of having the alien make the application.

The formal application for a visa will be made, by the person desiring admission, according to appropriate advice which he may receive from the Consul in the country where he is. By way of exceptions, it is stated that, in respect to citizens of countries of the Western Hemisphere, officials of foreign governments, seamen, and other special categories, the cases shall continue to be presented, as heretofore, to the appropriate American diplomatic or consular officials.

There are three principal situations requiring different types of visas: 1) The Immigration Visa for permanent residence; 2) The Temporary Visitor's Visa; and 3) The Transit Visa. The procedure in these several situations requires separate forms to be used in the particular cases. Biographical data concerning the applicant is to be submitted on a separate form, for each alien eighteen years of age or over. It may be submitted by any person well acquainted with the history of the alien. If there is no person in this country able to furnish this detailed information, the form may be executed before an American Consul abroad by the alien or by a directly interested person. Affidavits of support and sponsorship are required on behalf of every alien (or alien family group) desiring to enter the United States for permanent residence, where the alien does not have sufficient financial means to assure that he or she is not likely to become a public charge.

Affidavits of sponsorship, where necessary, may be submitted by interested persons other than American citizens and permanent resident aliens. Their use is for temporary admissions and for aliens seeking permanent admission who are in no need of financial sponsorship. They also are used for aliens seeking admission as non-quota students.

The family group idea above mentioned means that one form may include the names of a whole alien family if the family is traveling together to the United States.

The Department supplies, upon request by interested persons, detailed information regarding each of these categories. Certain supporting documents are required to be submitted with the respective forms as explained thereon.

It is stated by the Department that action on each case will be taken as promptly as possible but that some time must elapse in connection with the careful examination of each case. The cases are considered in proper turn by Interdepartmental Committees acting in an advisory capacity with reference to the national defense program. After this examination of each case, an "appropriate communication" will be sent to the consul concerned for his further consideration of the case. When the case is thus referred, the interested persons will be notified immediately by the Department; and, at the request of such interested person and at his expense, the notification will be sent to the consul by telegraph.

The Consul will advise the alien as to the making of his formal application for a visa. But, even where a case is given preliminary approval by a Consul, the visa ordinarily will not be granted until satisfactory evidence is submitted to show that the alien will be able to proceed to the United States within the period of the validity of the visa; and that he has transportation reservations; and definite evidence that he is able to obtain an exit permit and transit visas to the port of embarkation.

No power of attorney is provided for in this procedure, but there is a form entitled: "Designation to act

as agent or representative of person desiring to sponsor the admission of an alien into the United States." It requires the potential sponsor to state he understands "that there is no provision of law or prescribed formal procedure under which an interested party or agent of such party may make representations or appeals before any official, board or committee considering alien visa cases at the Department of State"; and he also understands "that ordinarily the Department of State prefers to deal directly with the interested party, rather than through intermediaries."

Rapid Senatorial Succession

The State of South Carolina is establishing a record for quick succession in one of its Senatorial positions. The dramatics of this rapid-fire change in the State's representation are heightened by the contrast with South Carolina's other senatorship. The dean of the Senate, in point of continuous service, is Senator Ellison D. Smith who has served South Carolina in the United States Senate since March 4, 1909.

In the other senatorship, South Carolina, within a period of three months plus one week (that is, by October 15, 1941) will have had four Senators. The rapid succession started with the swearing in as Associate Justice of the Supreme Court of former Senator James F. Byrnes on July 8, 1941. To fill the vacancy created by this change, the Governor appointed former United States District Judge Alva M. Lumpkin, who died at his post of senatorial duty August 1st, in Washington. The new vacancy was filled by appointment of Roger C. Peace, 42 years old and publisher of the Greenville News-Piedmont. A special election to fill the Byrnes vacancy is to be held September 30th; and the man then elected will take office on October 15th to fill the unexpired term of Mr. Byrnes, ending in January, 1943. Senator Peace, third in this line of quick succession, is not a candidate at the special election. South Carolina will therefore have its fourth Senator in this position in just a little more than three months.

Crime in the United States

THE JOURNAL is in receipt of the September number of *The Annals of the American Academy of Political and Social Science* (Philadelphia) which is devoted to a discussion of Crime in the United States. The Foreword presents a justification for such a discussion in which it is said in part:

> In the United States every man is his own criminologist. He glibly and confidently assigns definite reasons for our high crime rates and for the causes of juvenile delinquency in other than his own children, and has an effective and final scheme for the solution of the crime problem. The trained criminologist is much more humble and freely admits that the study of the causes of criminal conduct presents many opaque and baffling problems for which no satisfactory scientific methodology has yet been formulated. Tentative and probable conclusions are all that the criminological research worker can offer the community that demands that something be done. The complex process of personality development necessitates the division of causation research into several fields or aspects for careful and detailed study. Such a parceling out process inevitably results in duplication and overlapping, as may be seen when investigators attempt to understand the relationship of crime to our economic system in its operational and structural aspects. Psychiatrists and psychologists, and even biologists, may find themselves crossing each other's domains. The emphasis and orientation of these various disciplines justify whatever repetition may result.
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> The present issue of The Annals presents as much of the relevant and reliable information about crime causation as can be obtained at the present time, and while each contributor may emphasize the specific causation pattern he is discussing, he remains keenly aware of the limitations of his particular approach. To build a house requires many skills; to understand crime causation requires many points of view.

Some of the leading articles are: "Crime As Social Reality," by Jerome Hall, Professor of Law, Indiana University School of Law; "Enforcement of the Criminal Law," by Bruce Smith, a member of the staff of the Institute of Public Administration, New York City; "The Sources of Criminal Statistics," by Ronald H. Beattie, statistician in the Administrative Office of the U. S. Courts, Washington, D.C.; "The Geography of Crime," by Joseph Cohen, Professor of Sociology, University of Washington, Seattle; "The Psychologist Looks at Crime," by Lloyd N. Yepsen of the New Jersey State Department of Institutions and Agencies; and "The Psychiatrist Looks at Delinquency and Crime," by William Healy who is well-known as the Director of the Judge Baker Guidance Center of Boston.

Lawyers and other students of the law who are interested in criminal law will find this issue of the Annals a source-book of considerable value.

Non-liability of Bar Association Officers

[*From THE RECORDER (San Francisco lawyers' newspaper) August 7, 1941.*]

"YOU cannot hold The State Bar of California civilly liable for recommending, even unsuccessfully, your disbarment—such is the decision of Judge W. Turney Fox of the Superior Court in Los Angeles, in an action for malicious prosecution brought by William H. Neblett.

"Neblett successfully resisted the disbarment recommendation by the governors of the State Bar when his case came before the Supreme Court; and that was the basis of his action against State Bar officials and others.

"Demurrers were sustained by Judge Fox, without leave to amend, on behalf of Gerald H. Hagar, who was president of the State Bar when the action was initiated; Grove J. Fink, vice-president; the executive secretary, Claude Minard, and others.

"There were others named by Neblett, not connected with the State Bar, against whom Judge Fox found that Neblett had a cause of action."

LONDON LETTER

After all the damage suffered by the Inns of Court it is refreshing to be able to write that no further enemy activity has disturbed what remains of their peace since the last London Letter was dispatched.

Middle Temple Treasures.

In view of the tragedy which has befallen the Inner Temple and Gray's Inn, referred to in the last London Letter, the Benchers of the Middle Temple have decided to move more of their treasures to places of greater safety. The famous Molyneux Globes have gone. These Globes (one Terrestrial, the other Celestial) take their name from the maker of them, Emerie Molyneux, of Lambeth, who was described by Richard Hakluyt as "a rare gentleman in his profession." They are 2 feet 2 inches in diameter and are mounted on stands. They were completed in the year 1592, but the Terrestrial Globe received additions in 1603, and the original date has been altered with a pen. A Latin inscription on the Globe sets forth that Virginia was first surveyed, inhabited and cultivated by the English at the cost of Sir Walter Raleigh, assisted by Queen Elizabeth. The great voyage by Sir Francis Drake (1578-80) when he first achieved the circumnavigation of the Globe is traced by Molyneux with a red line; and the route taken by Thomas Cavendish when he repeated that feat in 1586-88 is indicated by a blue one. The great value of these Globes will be appreciated when it is mentioned that, with the possible exception of one pair, said to be at Cassel in Germany, no similar Globes made by Molyneux have survived to this day.

Another of the treasures to go is the collection of Plate belonging to the Inn. It might be supposed that, in view of the antiquity of the Middle Temple, much of it would have dated back to Tudor times, but this is not the case, the reason being that in earlier days it was customary to sell old silver in order to buy new. Another cause contributing to the lack of early specimens is to be found in the financial embarrassment occasioned by the Civil War in 1642, when the whole burden of financing the Society fell upon the shoulders of the Under Treasurer and, when conditions became more normal in 1647, it was found that the Inn's indebtedness to him was no less than £1,800. One of the expedients resorted to in order to liquidate the debt is found in an order of the 1st June, 1649: "That all the Plate of the House more than is for ordinarie use be forthwith solde by Master Treasurer and the monies thereof coming payed to the Under Treasurer in parte satisfaction of his debt due to him from the House." In spite of this the Middle Temple has acquired a fine collection, much of it by presentation, and it is well worthwhile to take all precautions to preserve it.

The High Table, or Bench Table in the Hall has also been removed. This table is thirty feet long and three feet, two inches wide, and is made from four planks of oak grown in Windsor Forest. It was the gift of Queen Elizabeth when the Hall was built and, according to tradition was floated down the Thames and built inside the Hall. This is the first time it has been taken out of the Hall. Another table of special interest to go is the Drake Table, known as the "Cupboard." It is of English oak and was made from timber taken from the *Golden Hind,* the ship in which Drake sailed round the world. A "Cupboard" has, from the earliest times been the centre of ceremonies in the Middle Temple Hall and is mentioned in the surviving records of the Inn as early as the reign of Henry vii. when the old Hall of the Knights Templars was in being. Proclamations affecting the Members of the Inn in their collegiate life were made from it. Readers stood by it to deliver their discourses. At it calls to the Bar were made, and the oaths of Supremacy and Allegiance taken by the newly-called barristers, and those called to that degree in the present day sign the Society's Roll of Barristers at this table.

The magnificent oak screen in the Middle Temple Hall, the damage to which was referred to in the London Letter of March last, has also been taken to a place of safety. The many hundreds of pieces into which it was smashed have been carefully collected from the wreckage which covered the floor of the Hall after the disaster, and very little was lost. The pieces have now been carefully packed and stored pending a return to happier days, when the Hall may be restored to its former glory.

To avoid the fate of the Inner Temple and Gray's Inn it was decided to move practically all of the Law books from the Middle Temple Library to a place some distance from London, and this has now been accomplished. Approximately 50,000 volumes, as well as a collection of Parliamentary publications dating back to 1862, and a miscellaneous collection before that date, have been moved. As a matter of minor interest it may be mentioned that the estimated weight of these books is eighty tons. Only a skeleton English Law library has been retained for the use of Members of the Inn.

Lincoln's Inn.

The Benchers of Lincoln's Inn which, as previously stated has suffered less damage than the other Inns of Court, having sent away a selection of their most valuable books and manuscripts, as well as their historic Black Books, have decided to retain their Library service in the hope that their good fortune may continue. They have generously offered the use of their Library to all those Members of the Bar who may wish to consult books not now obtainable in their own Libraries.

Barristers and War Service.

So many Members of the Bar have volunteered or registered for military or other war service that it is feared there may be some difficulty, if such a

drain on the profession continues, of retaining in practice sufficient numbers to deal with the work of the Courts. In fact it is upon record that, at a recent Assize Court, a solicitor was instructed by the presiding judge to conduct a case for which no barrister was available. With the object of preventing such a state of affairs the General Council of the Bar has set up a committee to consider what deferments should be recommended for the purpose of safeguarding the efficient administration of justice, and Members of the Bar, aged 35 or upwards, who have not yet received their enlistment notices, have been requested to send their names and addresses to the Secretary of the Bar Council, and thus assist the committee in their deliberations. The attention of Barristers is also called to the fact that applications by them for deferment in the case of clerks whose services they regard as essential for the said purpose, and who are aged 35 or upwards, and who have registered but have not received an enlistment notice, are among those which will now be given consideration. Such applications will be considered by the same committee. It is understood that recommendations have already been made to the Lord Chancellor with a view to further action being taken.

Overcoming Difficulties.

Various measures have been taken to overcome some of the difficulties which have arisen as a result of the intensive bombing to which London has been subjected. An announcement was recently made to the effect that where papers in cases going to appeal have been lost as a result of enemy action, solicitors for both appellants and respondents might have access to the papers already lodged for the use of the Court of Appeal in order to facilitate the preparation of papers necessary for the conduct of appeals. It was also provided that if, for the same reason, it was found to be impossible to proceed with *nisi prius* actions in the King's Bench Division, a letter setting out the facts and signed by the solicitors or parties should be lodged with the Chief Associate, and notice given to the other side stating that this had been done. Such actions would then be marked "stayed" pending further arrangements.

Council and solicitors who had, as a result of the raid of the 10th May last, to find temporary accommodation, were informed by a notice in the Cause List that arrangements had been made to enable them to leave their temporary addresses and telephone numbers at a table in the anteroom of King's Bench Judges Chambers in order that they might more readily get in touch with one another. The Incorporated Council of Law Reporting for England and Wales have given notice that as their premises in Serjeants Inn were completely burnt out, their new address is 6 Stone Buildings, Lincoln's Inn, W.C.2. They request those subscribers who have paid their subscription to the Law Reports for the current year to send their names and addresses to the Secretary, giving if possible the date of payment and the official number on the receipt, so that future issues for the year may be sent to them.

Allied Powers Maritime Courts.

One of the most interesting items of all the war legislation yet passed here is the Allied Powers (Maritime Courts) Act, 1941, the purpose of which is to authorize the Allied Governments established in this country, which possess Mercantile Marines, to set up their own Maritime Courts in England. These Courts have jurisdiction to deal with the following offences against the law of the power establishing the Maritime Court: (a) offences committed by any person on board a merchant ship of that Power; (b) offences committed by the master or members of the crew of a merchant ship of that Power in contravention of the merchant shipping law of that Power; and (c) offences committed by a person who is a national of that Power, and a seafaring person, in contravention of the mercantile marine conscription law of that Power. The Courts have no jurisdiction over British subjects, and the Act contains safeguards for ensuring that British subjects shall not be required to appear before them. Further, it is provided that no person shall be tried by such Maritime Court who has already been acquitted or convicted by a British Court. It is also provided that British Courts shall not be deprived of jurisdiction in respect of any act or omission constituting an offence against the law of any part of His Majesty's Dominions. Proceedings before the Courts will be instituted by Justices of the Peace in the form of a summons to the person charged requiring him to appear before the Maritime Court of the Power concerned at such time and place as may be specified in the summons, or a warrant may be issued for his arrest requiring him to be brought before that Court. Provisions for compelling the attendance of witnesses before Maritime Courts are also included in the Act. Two forms of punishment only are provided for offences under the Act, namely—detention and fine. Persons sentenced to detention will be detained in British prisons. Except in the matter of contempt of Court committed by a British subject, the Act sets no limit to the term of imprisonment or the amount of the fine which may be imposed. The decision of a Maritime Court on any question within its jurisdiction is not subject to appeal to any British Court, but the Act provides machinery for challenging the jurisdiction of the Maritime Courts by means of an application to the High Court in cases where it is claimed that such jurisdiction has been exceeded. Orders have been made applying the provisions of the Act to nationals of Belgium, Greece, the Netherlands, Norway and Poland.

Postscript.

Since the above was written the enemy has treated London to another "firework display," but its brilliancy was not to be compared with his former efforts and, happily, the Inns of Court escaped further attention.

S.

The Temple.

EARLIEST AMERICAN LAW JOURNAL

LAWYERS who have been bitten by the antiquarian bug (and the number is large and growing) will be interested in the volume whose fly-leaf appears on this page. It was discovered by the writer among the dusty shelves of a second-hand book store on one of his regular perambulations through the *Americana* section of old book stores. It is a solidly bound volume of over 1200 pages and contains the monthly issues of *U. S. Monthly Law Magazine* for the year 1851; together with a 250 page *Law List* (of which more later) of all the lawyers in the United States 90 years ago. It was published by a New York lawyer, "John Livingston, Editor and Proprietor, 54 Wall Street, New York." It appears from the Preface to the volume that the magazine was started one year earlier because in commending his volume the editor says, "We adopted such improvements as an experience of 12 months has suggested; and we are pleased in being enabled to say that the extraordinary popularity which has attended its publication warrants us in adding other new and expensive features."

That this is actually the earliest American law journal is definitely claimed in the Preface where it is said:

> "This is the first Journal of the precise kind which has been instituted in America; and so well has it been received that it is now established on a permanent basis. . . . We cannot let pass this opportunity of expressing our gratitude to the press, which, throughout all parts of the country, has been unanimous in its approbation."

The Law List earlier mentioned is published as a sort of appendix to the volume. Here is a kind of gold mine for lawyers interested in questions of professional genealogy. The Introduction to the Law List says among other things:

> "According to this work, the whole number of lawyers in the United States is 24,948. Supposing that of the above number 948 have retired from practice, and that the annual emoluments of each practicing lawyer averages $1,500 (which we think is nearly correct), the total income of the profession would be $36,000,000."

The total number of lawyers in each state is given, the leading states being New York 4740, Ohio 2031, Pennsylvania 1848, Virginia 1420, Massachusetts 1132, Kentucky 1066, Georgia 908, Illinois 862, and Indiana 851.

The list for California is particularly interesting because it contains a note reading:

> "We regret that our efforts to obtain full lists from California have proved unsuccessful. It will be seen there are no returns from San Francisco or Sacramento, the lawyers there being "in the habit" of receiving from $50 to $150 a day for services, we could find no one willing to give the information for what we have been accustomed to considering a reasonable compensation. This is the only state for which our catalogue is incomplete."

In another part of the volume appears some comment on the task with which the editor was confronted in securing accurate information for the Law List. It is there stated:

> "The list of lawyers and judges was compiled from official returns received from the clerks, recording officers and sheriffs of the various counties, and it is believed the same will be found correct and complete up to the present time *and that the work will be found to contain the address of every lawyer in the United States.* . . . It can be forwarded by mail to any part of the country. The price is $1.00."

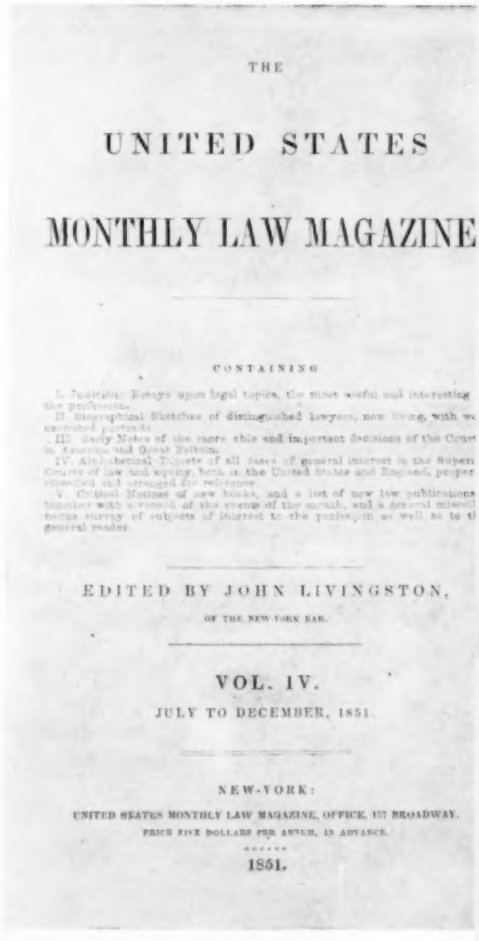
The volume contains among other things a number of unusually fine etchings of lawyers prominent 100 years ago. The first portrait appearing at the front of the book is that of William Cranch, who was then "Chief Judge of the U. S. Circuit of the District of Columbia" and who is the famous reporter of the Supreme Court Reports. The volume contains an interesting memoir of him. Other fine portraits include that of John Livingston, the editor of the Law Magazine, Joseph M. Lumpkin, Chief Justice of Georgia, John Belton O'Neall, Judge of the Court of Appeals of South Carolina, and J. W. Edmonds, Judge of the Supreme Court of New York.

Harvard Law School men will be particularly interested in an article entitled "Nature and Method of Legal Studies" which was inspired by the "Catalogue of the Law School of the University of Cambridge for the Academic Year 1850-51." This extended article in its concluding parts contains four pages of historical data about Harvard Law School. It is there stated that "the library contains about 14,000 volumes, embracing almost every work upon the English and American law of value to the student." In discussing the history of the school, it is said among other things:

> "The first professor was established in 1815 and a second in 1817. The first class contained only one student and in 1828 there were only nine. The next year the Hon. Nathan Dane made a donation of $10,000 and Joseph Story became a professor in the school. In 1833 Simon Greenleaf became associated with Mr. Justice Story and the institution, like their writings, soon obtained a reputation wherever the English language was read by lawyers." . . .
>
> The whole number of students who had entered the institution up to the end of 1848 was 1442, of whom the larger portion received the degree of Bachelor of Laws.
>
> The largest number of students in attendance in any year during the life of Judge Story was 123 and this number was never exceeded except in the year 1848. The number of students during the last term was 103 and we suppose the number during the year [*sic*] considerably greater."

The comment about Harvard concludes:

> "If we have spoken in terms of strong commendation of the law school at Cambridge, it has not been from any invidious feeling toward other similar institutions, nor from any other interest in its success than that which every lawyer ought to feel in an institution which has conferred so much honor upon its profession and which is so intimately connected with the best hopes of its future. We have only sought to call attention to the importance of a scientific, academical study of the law; and having been furnished with a catalogue of the Law Institution at Cambridge, we have explained the advantages it affords as a fitting illustration of our views. If anything we have said shall secure the Law School one additional student, we shall have the consolation of thinking we have conferred a favor upon him, and not upon the institution whose advantages he has had the good fortune to enjoy. We rejoice in the tendency now so generally manifested to elevate the standard of professional education. It has recently given birth to several Law Schools of greater or less merit, and we wish them the full measure of success to which their excellence entitles them."



THE

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EDITED BY JOHN LIVINGSTON,

OF THE NEW-YORK BAR.

VOL. IV.

JULY TO DECEMBER, 1851.

NEW-YORK:

UNITED STATES MONTHLY LAW MAGAZINE, OFFICE, 107 BROADWAY.

PRICE FIVE DOLLARS PER ANNUM, IN ADVANCE.

1851.

Other interesting historical items abound throughout the volume. Space forbids comment on them here. Perhaps at some later time we will make some use of them in the JOURNAL.

U. A. L.

LAWYERS AND THE ART OF LIVING—IV

[*Three short articles have appeared in the* JOURNAL *during the last year, under the above title (July, p. 591; Sept., p. 722; Nov., p. 854). The following article is taken from an address by Hon. Robert C. Jackson, former Circuit Judge in Virginia, which appeared in the* Virginia Bar Weekly, *July 8, 1941, under the title* "The Lawyer and Leisure." *It is an appropriate addition to our Symposium on* Lawyers and the Art of Living.—ED.]

I am aware of the fact that I am to talk primarily to a group of busy lawyers and judges this evening, and that it is customary for those who talk on occasions of this kind to direct their remarks largely to the "Lawyer and his Work," or some phase thereof, but I am going to invite you to accompany me this evening into somewhat of a serener atmosphere and rest there awhile for strength and refreshment. I am going to talk to you about "The Lawyer and Leisure." I know what some of you are thinking and saying to yourself: "Leisure—leisure, why I have no leisure—my time is so completely taken up by the study and practice of law that I have no time for anything else." One often hears such expressions from busy lawyers, as well as from busy people in occupations and professions other than the law. To such an extent is this true that it has come to be regarded by intelligent foreigners who have visited our country, as an American characteristic and a serious defect in our civilization. Two distinguished Englishmen have especially noted this absorption in business, and our emphasis on material things and solemnly warned us against its dangers.

A few of us are old enough to recall Herbert Spencer's visit to this country in 1882. He came to study our institutions and the character and habits of our people. He made one speech while here in New York, taking as his subject "The Gospel of Relaxation." In the course of his address he frankly stated that he had observed on every hand a philosophy of life that concerned itself chiefly with making a living and piling up wealth to the exclusion of the finer things, and in this way, he declared, we are losing much of the beauty and power of life.

In 1919 Lord Grey, of Falloden, visited this country. I believe it is said that this was the first and only time this interesting man and great statesman ever made a journey beyond the English border. While here he made an address before the students and faculty of Harvard, choosing as his subject "Recreation." The speech has been since published and is a classic. The basic thought in his address is the same as Herbert Spencer's, that is, that we are too much absorbed in business and the acquisition of things, and that some degree of leisure and the ability to use it is essential to both happiness and service.

While materialism as a philosophy of life so strongly condemned by Spencer and Lord Grey has lost some of its hold upon present day thought, no one who thinks or observes tendencies can well deny that materialism as a gross, stupid fact of human existence still has a firm hold upon the lives of men. The names of those are legion who are obsessed with the idea that the world is a workshop and that success in any business or profession can only be attained by eating, sleeping, dreaming and living in it. Many members of our profession are obsessed with that idea.

I would not, for a moment, minimize the value and importance of work. A man's happiness depends largely on the degree of satisfaction and enjoyment he gets out of his work. Hard work is the first essential of both happiness and service. Every real man despises idleness and mere pleasure chasing. I have no patience with the lawyer who does not take our profession seriously. Ours is a noble profession, and the study and practice of law an interesting and absorbing activity. Next to the ministry, it is the greatest of all professions. It is a fine thing to be a good lawyer and no one can be a good lawyer unless he works hard and long. It is true, too, that the law is a "jealous mistress," but I cannot but regard it as a serious mistake for any lawyer to act on the idea that work and leisure are incompatible, and permit the "jealous mistress" to make a door mop of him instead of an enthusiastic and loyal candidate for her smiles and favors.

The lawyer who goes to his office at nine in the morning, and works until five in the evening has done enough in his profession for one day, and is entitled to some time he can call his own and for the development of his powers. The lawyer who does this and backs his work with character will come to his own. In fact, I am sure that by so ordering and planning his time he will enjoy a far greater measure of professional success than he would if he gave all his time to work. Health and strength are essentials to success in any profession or occupation, and one who never has any leisure can not long possess these essentials. The secret of successful work is to keep persistently at one's best.

Among the best forms of recreation are hunting and fishing. They take us back to our ancestors and keep the wilderness side of us alive. They are manly, interesting sports which keep us in close touch with nature, and being an enthusiastic hunter and fisherman myself, I have a genuine sense of pity for the man who has never learned to love them. Fishing is especially fine recreation. We are not always successful, but the finest thing, perhaps, about fishing is not the fish we catch, but the fish we are going to catch, and just fishing. If you are a real sport, failure will write no wrinkles on your brow, nor leave any malice in your heart, and you will try, try again. It will at least take you outside of yourself. You will dream more, hope more, be more.

PROFESSIONAL ETHICS COMMITTEE

OPINION No. 219

Filed July 12, 1941

FIRM NAMES—A full disclosure of the personnel of a law firm should be made when any possibility of deception exists as to who are the partners.

The Special Committee on Law Lists of the American Bar Association presents the question of whether or not the Canons of Ethics are violated in two specific instances:

(a) A law list contains the name of "H. C. & Son." The original H. C. is dead. His son of the same name and another lawyer named E. H. are listed as constituting the firm.

(b) A law list contains the name of "C. F. M. & Associates."

The opinion of the committee was stated by MR. JACKSON, Messrs. Houghton, Miller, Drinker, Phillips, and Brown concurring. MR. BRAND dissenting.

Similar questions have been the subject of opinions by the committee in the past (Opinions 6, 97, 192). It is entirely clear from these opinions that, as a matter of ethics, the death of a partner need not be reflected by a change in the firm name, where the remaining partner or partners continue the practice, provided deception is avoided, as by giving the names of the partners on letterheads or listings. The use of the word "Son" in conjunction with a name is no more misleading than the use of the name of a deceased partner, and the committee does not believe that such use violates the provision of Canon 33 that "no false or assumed or trade name should be used to disguise the practitioner or his partnership." If any possibility of this exists, such possibility should be eliminated by a full disclosure of the personnel constituting the firm.

The use of the word "associates" in conjunction with the name of an individual negatives the existence of a partnership. It implies no more than that the individual practitioner employs law clerks. The associates would obviously have no right to continue to use the name of "C. F. M." after his death.

The committee is not unmindful of the fact that many of the states have statutes requiring the filing and publication of a certificate setting out the names of individuals doing business under a firm or trade name and the conditions under which such a name may be continued in use upon the death of a member, nor of the fact that rules of procedure frequently require the use on court papers of the name of counsel admitted to practice in that court. These statutes and rules serve a purpose similar to that of Canon 33 but are not in conflict with it.

We add only that where court rules forbid the use in the practice of the law of the name of a deceased partner, such rule must, of course, be observed. An example of this is found in the rules governing the Montreal Bar, which provide (Rule 54):

> The following acts, amongst others, are derogatory to the honour and dignity of the profession . . .
>
> (3) to make use in the exercise of his profession of the name of any advocate who has ceased to practice by reason of death or other cause.

MR. BRAND dissenting:

I am not able to concur in the foregoing opinion as to the propriety of the continued use of the name "H. C. & Son."

It is assumed that E. H. was not a member of the firm prior to the death of H. C. Sr., which dissolved that partnership and vested in H. C. Jr., the right, as sole survivor, to *liquidate* its affairs. The arrangement between the son and E. H. created a *new* partnership—the right to engage in which is distinct from the son's right as liquidator of the old firm.

The old firm name particularly represented that the partners were father and son—a relationship foreign to E. H. What we said in Opinion 97 is pertinent:

> If . . . the firm name *purports to identify the individual members thereof* such use of the name in the opinion of the committee, would be professionally improper. (Italics mine.)

Such an intimate description of partners as father and son *per se* purports to identify the individual firm members.* In that respect it is, as to both members of the new firm, false and misleading. It is also a trade name used to identify the firm's business. Under the circumstances the use of the old firm name by the new firm violates Canon 33.

The provision of the Canon as to the use of the name of a "deceased or former partner" remains to be considered.

The Canons deal with a professional relationship that is extremely personal and fiduciary in character, and in which trust and confidence on the part of the client are predicated upon the contemplated ability and integrity of the attorney. Canon 33 demonstrates that the name under which members of the bar hold themselves out to the public as partners, is regarded as an important element in the creation and continuation of that relationship.

The limited provision for permissible use of the name of a deceased or former partner was not intended to override the expressed general objective of the Canon that no firm name be used that is false or misleading or is an assumed name or a trade name, nor the specific requirement that the use shall work no imposition or deception. Regardless of the rights of the son, as surviving partner, in the *liquidation* of the old firm's affairs, there is nothing in Canon 33 which gives E. H. or the new partnership the right to practice law under the old firm name.

---

*This is the basis of court decisions that a firm name consisting of a surname followed by "& Son" is not an assumed or fictitious name (within the meaning of statutes requiring registration of such names) *as to partners who are, in reality, father and son.* (Anno. 45 A.L.R. 263.) Cf. as to statutes requiring registration of partnerships.

OPINION No. 221
Filed July 12, 1941

ADVERTISING—It is unethical for a lawyer to publish a card in an insurance magazine of general circulation holding himself out as an "insurance attorney and adjuster."

A member of the American Bar Association inquires:

> **Is it contrary to the Canons of Ethics for a lawyer to carry a card in an insurance magazine of general circulation, holding himself out as an "insurance attorney and adjuster?"**

The opinion of the committee was stated by MR. HOUGHTON, Messrs. Miller, Drinker, Phillips, Brown, Brand, and Jackson concurring.

In our opinion, the card mentioned violates Canon 27. The only medium in which the lawyer is permitted to publish his card is an approved law list or a legal directory. An insurance magazine is not such an approved law list or a legal directory.

OPINION No. 222
Filed July 12, 1941

CONFLICTING INTERESTS—It is improper for a lawyer to represent two defendants in an action, where it is his duty on behalf of one defendant to contend for that which, on behalf of the other, it is his duty to oppose.

A represents an insurance company which is interested in a damage case arising out of an automobile collision. One defendant is a corporation, C. At the time of the collision, one of its automobiles was being operated by B, its assistant manager, who was made a co-defendant. A told the insurance company that he considered it wise to represent both defendants. Such representation was arranged. At the trial, A contended that B was not driving the car upon any business of C. The court directed a verdict for C. Recovery was had against B. The insurance company was subjected to garnishment proceedings to collect the judgment. A appeared and contended that B was driving the car without the consent of C. This is a criminal offense. The court directed a verdict for the insurance company. Was A's conduct improper?

The opinion of the committee was stated by MR. MILLER, Messrs. Houghton, Drinker, Phillips, Brown, Brand, and Jackson concurring.

Canon 6 provides in part, as follows:

"It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose."

If there was any question about B driving the automobile without the consent of C, then clearly A undertook to represent conflicting interests, for it was his duty to contend on behalf of the insurance company for that which on behalf of B it was his duty to oppose.

Canon 6 recognizes an exception where there is express consent of all concerned given after a full disclosure of the facts. We do not pass upon the question of whether the exception would be applicable here upon such disclosure and consent, for the reason that the facts were in conflict and there was no such disclosure and of necessity could not be.

OPINION No. 223
Filed July 12, 1941

ADVERTISING — The listing of a lawyer's name in the nonclassified section of a telephone or city directory in a distinctive manner, such as bold face type followed by words indicating the listee is a lawyer, is a form of advertising.

A member of the Association inquires whether it would constitute a violation of Canon 27 for a lawyer to permit his name to be listed in a nonclassified section of a telephone directory or a city directory in bold face or other distinctive type.

The committee's opinion was stated by MR. PHILLIPS, Messrs. Houghton, Miller, Drinker, Brown, Brand, and Jackson concurring.

We assume the listing will indicate the listee is a lawyer. In Opinion 53 we condemn such listing in the classified section of a telephone directory.

Distinctive listing which identifies the listee as a lawyer is an implied solicitation of professional employment, whether found in the classified or regular section of the directory. We can see no other purpose to be served by bold face or other distinctive listing followed by the word "lawyer" or "attorney."

The question is accordingly answered in the affirmative.

OPINION No. 224
Filed July 12, 1941

CONFLICTING INTERESTS—Employment by one party to draw papers for both.

The following question has been presented to the Committee for its opinion:

> **May an attorney properly accept employment from a corporation for the purpose of drawing instruments of conveyance in order to consummate an agreement which the corporation has made with a private individual to recreate the individual's ground rent?**

The opinion of the committee was stated by MR. DRINKER, Messrs. Houghton, Miller, Phillips, Brown, Brand, and Jackson concurring.

The question presupposes that the corporation has solicited the owner of a home which is subject to a 6% ground rent, representing that the corporation can dispose of the ground rent on a 5½% basis resulting in a substantial saving to the owner, out of which the expenses of the transaction are first to be paid and the balance divided between the home owner and the corporation. The attorney is paid from the saving, but is employed by the corporation, he having no direct contact with the home owner.

Where two parties have entered into a valid agreement, the consummation of which requires legal advice and services, either of such parties may properly employ an attorney to draw the legal documents necessary to carry out their agreement. The fact that the other party does not see fit to employ an attorney in such cases does not affect the propriety of the first attorney acting, provided he in no way represents himself as advising the second party.

It would be manifestly to the advantage of the corporation in such cases to have the new ground rent drawn in such a way as to give maximum protection to the purchaser of

the ground rent without regard to the rights of the home owner, since this would enable the corporation to secure a higher price for the new ground rent, half of which increase would inure to the corporation.

Accordingly, we deem it improper in such a case for the attorney to accept employment from the corporation, unless the home owner is clearly advised that he should have counsel and the reasons therefor.

We do not pass on the question whether the corporation, under the facts, is engaged in the unauthorized practice of law, contributed to by the lawyer.

OPINION No. 225

Filed July 12, 1941

SOLICITATION — COLLECTION AGENCIES—It is unethical for a practicing lawyer to participate in the collection activities or the management of a collection agency which solicits business.

SAME—It is unethical for a practicing lawyer who owns, or has a financial interest in, a collection agency to accept employment as attorney in connection with any claim handled by the agency.

SAME—It is not unethical for a practicing lawyer to own, or have a financial interest in, a collection agency the business of which is legally conducted if the lawyer does not participate in the conduct of the business in any manner, does not allow his name to be used in the business and nothing is done to create the impression that the agency enjoys the benefit of the lawyer's advice and professional responsibility.

The committee's opinion has been requested on the question as to whether it is proper for a practicing lawyer to own, or have an interest in, a collection agency which solicits business under its corporate name or, if unincorporated, under a trade name, in any of the following circumstances:

(a) Where the lawyer participates in the collection activities of the agency or its management but, when a claim is uncollectible without suit, an outside lawyer is employed to handle the claim in court as attorney for the principal.

(b) Where the lawyer does not participate in the collection activities of the agency or its management but, when a claim is uncollectible without suit, handles the claim in court as attorney for the principal.

(c) Where the lawyer does not participate in its collection activities or its management and does not act as attorney in connection with any claim handled by the agency.

The opinion was stated by MR. BROWN, Messrs. Houghton, Miller, Drinker, Phillips, Brand, and Jackson concurring.

We shall assume that the collection activities of the agency are conducted in accordance with the law of the jurisdiction in which the agency operates and that there is involved no question of unauthorized practice of law or violation of either Canon 47 or Canon 35. See Opinion 198. Our inquiry shall be directed solely to the application of Canon 27, which prohibits the solicitation of professional employment.

(a) In the first situation, where the lawyer merely participates in the collection activities or the management of the agency, he is doing that which any layman may do. Nevertheless, we believe that the collection of claims without court action is "professional employment" within the meaning of Canon 27 when the service is performed by a lawyer. In Opinion 57 we held that a practicing lawyer may not devote part of his time to managing an insurance investigating and adjustment bureau which solicits business, even though the bureau renders no service which could not properly be rendered by a layman. We there said:

> The fact that a layman can lawfully render certain service does not necessarily mean that it would not be professional service when rendered by a lawyer.

Also, in Opinion 194, we said with respect to abstracting:

> . . . even though it may be lawful for a layman to perform such service in a particular state, we believe that it becomes a legal service when performed by a lawyer.

When a lawyer performs such services he is professionally responsible for the activities of the agency and they must conform to the canons of our profession. Where business is solicited the canons are violated.

We are of the opinion that a practicing lawyer can not participate in the collection activities or the management of an agency which solicits the collection of claims. If a lawyer is to participate in such activities he must withdraw from the practice of law, and refrain from holding himself out as a lawyer.

(b) In the second situation the lawyer does not participate in the collection activities of the agency or its management but has a financial interest in its business and is employed as attorney for the principal when the court proceedings are necessary to collect a claim.

We are of the opinion that, under such circumstances, the solicitation by the agency would constitute indirect solicitation of professional employment for the lawyer. As said in Opinion 57:

> Some businesses in which laymen engage are so closely associated with the practice of law that their solicitation of business may readily become a means of indirect solicitation of business for any lawyer that is associated with them.

The fact that a collection agency solicits business does not make it improper for a lawyer to accept employment, through the agency, to represent the owner of a solicited claim if there is no connection between the agency and the lawyer which makes the solicitation of the agency an indirect solicitation for the lawyer. See Opinion 198.

(c) In the third situation the lawyer has a financial interest in the collection agency but in no wise participates in its activities and does not accept professional employment through the agency. We can see no impropriety provided the name of the lawyer is neither included in the name of the agency, placed on its stationery, nor included in its advertisements, and nothing is done to create the impression that the agency enjoys the benefit of the lawyer's advice and professional responsibility.

The vice in the first two situations lies in the fact that the agency solicits work the performance of which will involve the professional responsibility or professional services of the lawyer. In the third situation the lawyer is merely an investor in a legitimate business the conduct of which will not involve his professional services or responsibility.

CURRENT EVENTS

Commemorating 100 Years of Probation

THE JOURNAL is in receipt of an attractive brochure issued by the National Probation Association, of which Hon. Charles Evans Hughes is Honorary Chairman, entitled *Commemorating 100 Years of Probation—1841-1941.*

The first item discussed is "The John Augustus Centennial," and concerns the story of the first probation case. The scene is a Boston police court in 1841; the principal actors a defendant who was being sent to jail as a "common drunk," the judge, and a spectator, a Boston shoemaker by the name of John Augustus. The narrative tells how John Augustus arose and said:

> Your honor, if this man be given another chance I will take him under my care and answer to the court for his conduct. Jail will ruin him!

Whereupon the surprised judge agreed and turned the defendant over to John Augustus rather than sending him to jail.

Another item is concerned with "A Century of Probation Progress" and gives a short summary of the development of probation during the last century. Another item discusses "Facts About Crime and Probation" and gives interesting and unusual facts and statistics which are not elsewhere readily available. It is stated for instance that there are approximately 1,500,000 serious crimes committed in the United States each year. Juvenile delinquencies total 200,000 a year, with boys leading over girls at the rate of seven to one.

"The Economics of Probation" is discussed and it is stated that in New York, for example, the annual per capita cost for caring for a prisoner is $550 whereas the costs for probation for a prisoner amount to $55. "The Case for Probation" is discussed and the various social benefits which it brings about are enumerated.

The National Probation Association was founded in 1907. Its first president was the late Judge Timothy D. Hurley of Chicago.

Military Justice

ONE of the factors in the World War era of 1917-19, of great interest to lawyers and also to soldiers and the public alike, was that of the functioning of the Military Courts Martial. In recognition of this situation, the Junior Bar Conference and the ABA Committee on National Defense have cooperated in the preparation and distribution in August, 1941, of a 12-page pamphlet entitled *Military Justice,* written by Lt. Frazer F. Hilder, Ordnance Department, United States Army. During and following the World War there was considerable lay criticism of the court-martial system, some of it proper and some of it unjustified. A Senate Investigation Report showed that most of the complaints about hardship and injustice were either unfounded or exaggerated. The public mind, however, was not fully informed on the subject, and an adverse impression remained in some quarters and no doubt still obtains to some extent. For that reason, among others, the present pamphlet fills a real public need. It contains an introduction by Paul F. Hannah, National Director of the Public Information Program of the Junior Bar Conference. Both the article and the introduction are well written and will be read with interest. The Committee on National Defense and the Junior Bar Conference deserve commendation for their good work. Copies of the pamphlet may be secured at ABA Headquarters in Chicago, or at room 905 American Security Building, Washington, D.C.

California Bar to Hear Walter P. Armstrong

[*From* The Recorder, *San Francisco's Lawyer's Newspaper.*]

"*THE Benefit of Counsel* is Walter P. Armstrong's title for the annual Morrison lecture which he will give Thursday night, September 18, at Yosemite. The lecture will be a high-light of the annual convention of the State Bar.

" 'Under the heading of "The Benefit of Counsel," ' Mr. Armstrong announced, 'I shall discuss the necessity and function of an independent bar in a democracy such as ours.'

"Mr. Armstrong will come to the California convention from Memphis, where he has practiced law since 1908. He has been nominated for the presidency of the American Bar Association, and has a long career of activities as a member of the American Bar and the Tennessee bar."

Criticism in Crisis

(From the Dayton Daily News. Reprinted in Chicago Law Bulletin.)

WE can agree with Dr. Frank H. Lahey, president of the American Medical association, that the present emergency "has reached a stage where unrestrained free speech may be harmful." We must insist, however, that more harm would come of forcible restraint of speech calculated to undermine the national morale than from letting it go on.

Until the last hour before war was declared, England allowed Oswald Mosely, its subversive fascist, to carry on his unpatriotic work. In time of peace the nations devoted to freedom must maintain the freedom of the individual, however blindly used. When the nation's existence is threatened, and then only, the nation must act as one. Once the bombers of the Hitler so much admired by Mosely were over Britain, Mosely was put where he could do no further harm.

A Letter

[The following letter presents one view of an important question. Ed.]

Pittsfield, Mass.
August 4th, 1941.

Editor, American Bar
Association Journal;

As was demonstrated, during the struggle arising out of President Roosevelt's proposal to reorganize the Supreme Court in 1937, the members of that court have other than strictly judicial functions. The constitution of the United States contains such words and phrases as "liberty," "property," "due process of law," "general welfare" and "commerce among the states." Such words and phrases are capable of no precise, exact, unalterable meaning. But from time to time it becomes the right and duty of the Supreme Court to construe, interpret, decide, and declare their meaning in matters deeply affecting the course and current of the life stream of our republic. In such construction and interpretation, the members of the Supreme Court are forced to act, not so much as judges between man and man, but rather as arbiters between nation and state, between nation or state and the individual, between one economic group and another economic group, in other words as social philosophers, as political economists, as elder statesmen.

To preserve the confidence of the country in their disinterestedness and utter impartiality in so acting, the members of the Supreme Court must be free of the slightest suspicion that they are guided in their several opinions by political ambition or partisan loyalty.

Such suspicion no matter how baseless will always chance to be present if the members of the Court allow their names to be used as possible candidates for high political or partisan office, especially the Presidency.

Chief Justice Stone could do no greater service to the Court and to the country, than by inducing his colleagues to join with him in signing and publishing a self-denying resolution, setting forth their belief that no member of the Supreme Court should ever be considered as available for any political or partisan office, including the Presidency, and expressing their hope and desire that the name of none of them ever be mentioned or used in connection with any such candidacy, appointment, or election.

JAMES M. ROSENTHAL

Title Deeds in Ancient Times

[The following interesting historical comment about the origin of title deeds is taken from the July number of the Library Review *published by the Department of Justice Library, Washington, D. C., of which Matthew A. McKavitt is Librarian.]*

"THERE is an exhibit of extremely old deeds on parchment and written in Latin in the Main Reading Room of the Library. [The exhibit was loaned to the Justice Department Library through the courtesy of the American Society of Book Plate Collectors and Designers.] Those written in the 13th and 14th Century are particularly interesting. The English Court hand, the old seals, the indentures, and the various shapes of the parchment make a compelling show.

Who first invented wills and deeds? No one knows. At the very dawn of written history we find them in a high state of development. Actual examples are available. For instance, a will, on papyrus, dating back to 2548 B.C. has been found in Egypt and a warranty deed, on a clay tablet, of 672 B.C. has been discovered. Both showed the use of witnesses.

The early people of Briton adopted the forms used by the Romans. The deeds at first were in Anglo-Saxon but Latin soon became the language of all formal documents. The old forms were followed even when English took the place of Latin at the Reformation.

We borrowed our forms of deeds from England. They had copied those of the French, who took the Roman form, who borrowed the form of the Greeks, who learned from the Hebrews, the Babylonians and the Egyptians. However, the distinctive features of the American system of recording deeds are indigenous.

The Normans introduced the practice of making deeds with wax seals.

The early Saxons always affixed the Cross whether they could write their own names or not. This practice, as we know, of using the Cross for signature is still done today by the illiterate. Then the Normans used the seal only to show authenticity, which remained the law until 1676 when the statute 29 Charles II, Ch. 3, directed that deeds be signed as well as sealed and delivered.

Additional Law List Approved

THE Special Committee on Law Lists announces the approval of the 1941 edition of the American Lawyers Insurance Service.

STANLEY B. HOUCK,
Chairman.

JUDICIAL BUSINESS IN TWO LEADING FEDERAL COURTS

[There is given below an interesting statistical comparison of the annual judicial business of two of the largest trial courts in the country, perhaps in the world—the Federal Courts in New York City and in Chicago. The figures for New York are taken from the New York Law Journal. The figures for Chicago were furnished especially for the JOURNAL *by Hon. Hoyt King, Clerk of the Court. No analysis of the figures given is here attempted. It is believed the statistics will be read with interest, not only by the judges and lawyers of the two districts, but also by lawyers and students of Jurisprudence elsewhere.* ED.*]*

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Statistics for Fiscal Year 1941 (13 Judges)

CIVIL AND CRIMINAL ACTIONS

CASES IN WHICH UNITED STATES IS NOT A PARTY

	Equity	Law	Misc.	Adm.	Civil	Total
Pending July 1, 1940.....	205	146	1	598	1880	2830
Commenced fiscal year 1941	6	4	118	495	1775	2398
Terminated fiscal year 1941	118	95	119	363	1584	2279
Pending June 30, 1941....	93	55	—	730	2071	2949

CASES IN WHICH UNITED STATES IS A PARTY

	Equity	Law	Adm.	Civil	Crim.	Total
Pending July 1, 1940.....	132	96	113	742	1037	2120
Commenced fiscal year 1941	3	3	303	893	1095	2297
Terminated fiscal year 1941	99	35	285	728	1091	2238
Pending June 30, 1941.....	36	64	131	907	1041	2179

NATURALIZATION

Petitions Filed	Aliens Admitted	Petitions Denied	Declarations of Intention Issued	Repatriations Filed	Repatriations Admitted
19,762	16,881	609	26,415	2,380	835

BANKRUPTCY PROCEEDINGS

	Section			Chapter				All	
	75	77	77B	X	XI	XII	XIII	others	Total
Pending July 1, 1940.....	13	2	376	29	251	—	10	2235	2916
Commenced fiscal year 1941	10	—	—	17	230	1	3	2211	2472
Terminated fiscal year 1941	7	—	92	13	231	1	6	2468	2818
Pending June 30, 1941....	16	2	284	33	250	—	7	1978	2570

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS

Statistics for Fiscal Year 1941 (6 Judges)

CIVIL AND CRIMINAL ACTIONS

	Crim.	Equity	Law	Misc.	Adm.	Civil	Total
Pending July 1, 1940.....	212	173	183	25	13	775	1381
Commenced fiscal year 1941	481	—	—	185	12	1323	2001
Terminated fiscal year 1941	536	57	67	163	18	1211	2052
Pending June 30, 1941.....	157	116	116	47	7	887	1330

NATURALIZATION

Petitions Filed	Aliens Admitted	Petitions Denied	Declarations of Intention Issued	Repatriations Filed	Repatriations Admitted
27,576	26,547	208	17,485	2,735	2,712

BANKRUPTCY PROCEEDINGS

	Section			Chapter				All	
	75	77	77B	X	XI	XII	XIII	others	Total
Pending July 1, 1940.....	32	6	114	47	37	87	95	2342	2760
Commenced fiscal year 1941	5	—	—	30	30	23	84	2419	2591
Terminated fiscal year 1941	7	2	38	24	33	64	30	2785	2983
Pending June 30, 1941....	30	4	76	53	34	46	149	1976	2368

MAY WE ASK A FAVOR OF YOU?

Will you help to extend the influence and activities of the Association by obtaining one new member?

An application form is printed below, or the headquarters office will send you separate forms, if you prefer.

A check for $6.00 ($3.00 if the applicant was originally admitted to the bar in 1936 or subsequent thereto) will cover the dues from October 1, 1941 to June 30, 1942.

AMERICAN BAR ASSOCIATION
1140 North Dearborn Street, Chicago, Illinois

Date and place of birth.....

Original admission to practice.....
State Year

Other states in which admitted to practice (if any).....

Bar Associations to which applicant belongs.....

.....

White ☐ Indian ☐ Mongolian ☐ Negro ☐

Name .....

Office Address .....
Street City State

Home Address .....
Street City State

Endorsed by .....Address .....

Check to the order of American Bar Association for $.....is attached.

BAR ASSOCIATION NEWS

Frank D. Foley
President, Georgia Bar Association

Georgia Bar Association

THE fifty-eighth annual meeting of the Georgia Bar Association was held at Savannah on May 22-24, 1941.

William Y. Atkinson of Newnan, president of the association, presided.

Thurman W. Arnold, Assistant Attorney General of the United States, spoke on the subject of "The Bottlenecks of Business." Marvin A. Allison of Lawrenceville, a member of the Legislature of Georgia, addressed the association on the subject of "Lawyers, Lobbyists, and Lawmakers." On Saturday morning Charles L. Gowen of Brunswick spoke on the subject of "The Recent Trend Toward Zoning and Planning." Joseph Warren Dukes of Valdosta, a member of the Junior Bar and a student of the law school of Emory University, addressed the association. A short address was made by John T. Vance, Law Librarian of the Law Library of Congress, Washington, D. C., upon the subject of the work of the Law Library of Congress.

The principal after-dinner address at the annual banquet was delivered by Hon. Francis Biddle, Solicitor General of the United States, who spoke on the subject of National Defense. Thurman W. Arnold and John T. Vance made short talks. Mr. Vance, in his own inimitable way, enlivened the banquet by singing some southern songs, accompanying himself on the guitar.

Concurrently with the meeting of the Georgia Bar Association and the Savannah Bar Association, the Committee of the American Bar Association on Unauthorized Practice of the Law met on May 23, 24 and 25.

Officers for the year 1941-42 are: Frank D. Foley of Columbus, President; Grover Middlebrooks of Atlanta, Vice President; Chas. J. Bloch of Macon, Treasurer; John B. Harris of Macon, Secretary; Benning M. Grice of Macon, Assistant Secretary-Treasurer.

JOHN B. HARRIS,
Secretary.

New Hampshire State Bar Association

THE annual meeting of the Bar Association of the State of New Hampshire was held at Melvin Village, New Hampshire, June 28, 1941. President Robert W. Upton gave the president's address. Various standing committees, including the Committee on National Defense, presented interesting reports. A law institute was conducted by Hon. William L. Ransom of New York City, former president of the American Bar Association, on the subject "Labor Laws and National Defense." The address at the evening banquet was delivered by Col. O. R. Maguire of Washington, Chairman of the American Bar Association Committee on Administrative Law, who spoke on that subject.

Officers for the year 1941-42 are: president, Hon. Henry A. Burque, Nashua; vice-president, Burt R. Cooper, Rochester; secretary-treasurer, Conrad E. Snow, Rochester.

CONRAD E. SNOW,
Secretary-Treasurer

Hon. Henri A. Burque
President, Bar Association of the State of New Hampshire

New York County Lawyers' Association

[*Excerpt from the report of the President, Robert McC. Marsh, presented at the annual meeting, May 15, 1941.*]

IT is not only the internal affairs of a bar organization which interest its members. We in this Association, like the entire profession, are watching with profound concern momentous events taking place in every quarter of the globe, and are speculating, as indeed we must, upon the future consequences to our means of livelihood and to our field of work. No form of society has more need of lawyers than a democracy, and therefore none offers us so wide an opportunity of service or so favorable a prospect for remuneration. Where men are free to undertake enterprises at their own risk, to bargain singly or collectively, to create, possess and

transfer property as they wish, while alive or upon death, and to express their honest views in speech or in writing, however critical these may be, even of the government itself, there will be need of lawyers to give sound advice, and for the defense and enforcement of rights. Where plaintiffs and defendants are free to seek judgments according to the facts and the established law, they will require men of legal training to handle their cases before judge and jury. But these kinds of freedom are guaranteed to our actual and potential clients only where there is democratic self-government. A totalitarian or other form of dictatorial or near-dictatorial government will no doubt employ *some* lawyers to give form and plausibility to the edicts of the rulers; but no autocracy could use more than a small fraction of the present membership of the bar. Under autocratic regimes independent or private lawyers are in fact either frowned upon as unnecessary or actually persecuted. If you need any further warning in this respect, read the article in the May number of the AMERICAN BAR ASSOCIATION JOURNAL entitled 'Lawyers in Germany'."

Loose-Leaf Service for State Bar Associations

THE New York State Bar Association for some time has furnished its members a printed loose-leaf service covering matters of interest to the lawyers of that state. The Colorado Bar Association has recently begun the same up-to-date practice. Perhaps other states are doing the same thing.

This growing tendency to "streamline" bar association publications is an indication, first, of the increased vigor and alertness of bar association work throughout the country; and second, it is an indication that the legal profession at long last is beginning to realize the importance of "modern design" (as the radio voice calls it) in presenting written matter to the reader.

James P. Dillard
President, Washington State Bar Association

Washington State Bar Association

THE annual meeting of the Washington State Bar Association was held in Rainier National Park, July 25-26. The business of the meeting was begun with an address by the president of the association, J. Speed Smith of Seattle. A leading address was that of Dean Judson F. Falknor, of the Law School, University of Washington, on "Legal Education—1941." Reports of standing committees occupied a prominent place in the meeting. An important event was an address by Hon. J. W. de B. Farris, K.C., Vancouver, B.C., former president of the Canadian Bar Association, on "Canada's Status at Home and Abroad." The address of Rev. James V. Linden, S.J., of Spokane, "Administrative Law from a Philosophical and Political Standpoint," attracted much attention. Hon. George B. Simpson of the Supreme Court of Washington spoke on "The Juvenile Court Bill."

James P. Dillard of Spokane was elected president for the year 1941-42.

TRACY E. GRIFFIN,
Secretary

JUNIOR BAR NOTES

By JAMES P. ECONOMOS
Secretary, Junior Bar Conference

IF the younger members of the Indiana Bar had the opportunity, they would probably write a joint letter somewhat as follows to each member of the Junior Bar Conference:

> Dear Friend:
>
> You are cordially invited to come to Indianapolis on September 28 and spend the rest of the week with us while you are attending the Annual Meeting of the Junior Bar Conference. We have made every preparation so that your stay with us will be enjoyable. We have arranged an informal supper dance at the Indianapolis Athletic Club on Sunday evening, the 28th of September. The following Tuesday evening, September 30th, the Highland Country Club will be the scene of a formal dinner dance. We have arranged each of these affairs so that you can meet and renew acquaintance with all your friends in the Conference and so that we may have an opportunity to meet you also.
>
> You have doubtless heard of Hoosier hospitality. You can rest assured that all Indiana lawyers will extend themselves to the utmost to give you a practical demonstration of what Hoosier hospitality really is.
>
> We are looking forward to meeting you personally upon your arrival to our city.
>
> Sincerely yours,
> YOUNG INDIANA LAWYERS.

All Junior Bar Committees have reported to the Chairman of the Conference, that everything is in readiness for the many members who are planning to attend the Eighth Annual Meeting. The activities for the session appear in the Advance Program which has been mailed to all members of the Conference.

The Executive Council's agenda is filled with numerous important items of business. Accordingly, Chairman Powell has asked the Council of the Junior Bar Conference to meet in Executive session on Saturday, September 27th at 9:30 A.M. in the Washington Hotel, Indianapolis. It is expected the session of the Council will occupy most of the day.

One of the head-line events is the address to the Junior Bar of the Judge Advocate General of the United States Army. The National Broadcasting Co. will present General Allen W. Gullion's talk over its red network at 4:30 to 5:00 P.M. Eastern Daylight Savings Time, Sunday, September 28.

Grenville Clark of New York City, past Chairman of the ABA Civil Rights Committee, will speak on the subject "Civil Rights in War Time," on Tuesday, September 30. He will be preceded by Robert Duval Guy, Jr., a barrister of Winnipeg, Canada. Mr. Guy is only twenty-nine years of age, but he has already achieved an enviable record as a Canadian lawyer. He is secretary of the Manitoba Council, Canadian Bar Association, Vice President of the Young Men's Section of the Winnipeg Board of Trade, and an active member on the Canadian Junior Chamber of Commerce.

One of the most important events on the program is the second annual meeting of delegates in affiliated state and local junior bar groups, which will be held Monday, September 29, at 12:30 P.M. Philip H. Lewis of Topeka, Vice-Chairman of the Conference and Chairman of the Committee on Cooperation with Junior Bar Groups, will be in charge. The agenda for this meeting includes talks by Vernon Burt, Ohio; C. Jay Parkinson, Utah; Herzel Plaine, New Jersey; and Gilbert Shake, Indiana; concerning the operation of the State Junior Bar Section. Suggested ways and means for conducting interesting and timely programs by Local Junior Bar Groups will be presented by Alvah T. Martin, Chicago; Whitney Harris, Los Angeles; Robert Bush, Des Moines; and J. Gilbert Prendergast, Baltimore.

The second issue of the Junior Bar News Bulletin has been printed and distributed to all officers of state and local Junior Bar groups. The many letters of commendation and constructive suggestions that have been received together with the additional information concerning the scope and mode of operation of the various state and local Junior Bar groups has prompted its issuance. Until further notice, it is planned to issue the Junior Bar News Bulletin quarterly. This issue contains comments concerning the annual reports that have been made by Lewis F. Powell, Jr., Paul F. Hannah, National Director of the Public Information Program, and Paul B. De Witt, National Director of the Procedural Reform Surveys. An extended statement is given concerning the work of the Junior Barristers of the Los Angeles Bar Association. Whitney R. Harris is president of this organization. Through the impetus received from this publication, new applications for affiliation by State and Junior Bar groups are being received by the secretary daily.

Another important meeting scheduled for Sunday morning, September 28, is the meeting of the State Chairmen and Public Information Directors which will be held in the Bamboo Room of the Washington Hotel. Paul F. Hannah, Washington, D.C., and Howard Cockrill, Little Rock, Arkansas, will preside. At this time a review will be given of the success that has been achieved by the program in sponsoring more than six hundred radio programs and an even larger number of platform talks. Explanations will be given concerning the procedure adopted in the operation of typical radio series such as those presented by the Junior Barristers of Los Angeles and the "Buck Private" program being conducted in Oklahoma City. Another interesting radio series that has started is the "Barristers Legal Forum" which is presented by the Barristers' Club of San Francisco every Monday evening over Station KYA at 7:15 to 7:30 P.M. Gunther R. Detert, President, has appointed Eugene M. Raggett, Chairman of this Forum. As Chairman, he presents questions concerning points of common and statutory law that are interesting to the laymen, then he receives answers from the members of the Forum who explain the historical background for each point of law.

The Canadian Bar Association

[*The 25th Annual meeting of the Canadian Bar Association was held in Toronto, September 11 to 13. At the request of the Journal, the following story of the meeting has been sent us by the Secretary—just as we go to press. Ed.*]

IN February, 1914, inspired by the successful meeting of the American Bar Association held in Montreal the previous year, a group of representative Canadian lawyers met to consider the organization of a national association with aims and objects similar to those of the American Bar Association. The first Annual Meeting of the Association was held at Ottawa in March 1914.

War came and passed, and the Association flourished. Twenty-five years later, it again faced the difficulties of carrying on in the face of international strife. As in 1917, no Annual Meeting was held in 1940. With the exception of these two years, however, the Association has continued to meet regularly. Its Twenty-fifth Annual Meeting has just been concluded in Canada's second largest city, Toronto.

This year, as in others, the Association enjoyed the privilege of entertaining many distinguished guests of other lands. Sir Norman Birkett, K.C., long one of the leading members of the English Bar, stirred and delighted his audiences with his wisdom and wit. Honourable Jacob M. Lashly (President of the American Bar Association) and Mrs. Lashly captivated the Canadians with the charm of their personalities and their interest in things Canadian. Dr. Enrique Gil (the official representative of the Republic of Argentina and a leading lawyer of that country) brought home to the Canadians some of the problems of hemispheric solidarity and forged a link between Canada and the great continent of South America. Maitre Henri Torrès, formerly of the Paris Bar and now a resident of New York, recalled happier days when many of the most distinguished members of the Bar of Paris had been guests of the Canadian and American Associations.

The Annual Dinner, with His Excellency the Governor-General of Canada as the principal guest, was largely attended. A spirit of optimism prevailed throughout the sessions and it was apparent that Canadians all look forward to the time when the democracies will emerge triumphant from the present struggle.

At the last session the following officers were elected for the year 1941-42:

President—J. McG. Stewart, K.C., Halifax

Dominion Vice-President—G. H. Aikins, K.C., Winnipeg

Vice-Presidents for the Provinces:

Alberta—C. Campbell McLaurin, K.C., Calgary

British Columbia—R. L. Maitland, K.C., Vancouver

Manitoba—W. P. Fillmore, K.C., Winnipeg

New Brunswick—H. A. Porter, K.C., Saint John

Nova Scotia—J. W. Godfrey, K.C., Halifax

Ontario—Kenneth F. Mackenzie, K.C., Toronto

Prince Edward Island—W. E. Bentley, K.C., Charlottetown

Quebec—Arthur Vallee, K.C., Montreal

Saskatchewan—J. G. Diefenbaker, K.C., Prince Albert

Honorary Treasurer—E. K. Williams, K.C., Winnipeg

Honorary Secretary—Gerald Fauteux, K.C., Montreal

Honorary Executive Secretary—E. H. Coleman, K.C., Ottawa

Secretary-Treasurer—T. W. Laidlaw, K.C., Winnipeg

Assistant Secretary—Glynn L. Cousley, Winnipeg

Registrar—K. G. Morden, Toronto

T. W. LAIDLAW, K.C.
Secretary-Treasurer
The Canadian Bar Association.

Buenos Aires Bar Association

The Argentina Bar, and particularly the Buenos Aires Bar Association, are to be represented at the annual meeting of the American Bar Association at Indianapolis. As we go to press, word comes to the JOURNAL that Dr. Enrique Gil, Vice-president of the Buenos Aires Bar Association, and a leading South American lawyer, has left by plane for the United States. He is to give one of the principal addresses at the Indianapolis meeting. Prior to that meeting Dr. Gil addressed the annual meeting of the Canadian Bar Association at Toronto, September 11. Dr. Gil has numerous friends in the United States who are looking forward to greeting him at Indianapolis. He is an exponent of *Hemispheric Solidarity*, which will be one of the keynote topics of the American Bar meeting.

Brazilian Bar Association

The Brazilian Bar Association (Institute Da Ordem Dos Advogados Brasileiros), "oldest of all Bar Associations in America," held a formal meeting on July 4 in Rio de Janeiro at which there was delivered to the Ambassador of the United States a diploma making President Roosevelt an honorary member of the Brazilian Bar Association. The JOURNAL has been furnished, from Brazil, a copy of the proceedings at the event. Only three other citizens of the United States have ever been so honored. They are Cordell Hull, Secretary of State, Dr. Leo S. Rowe, Director of the Pan American Union, and John Basset Moore, the eminent authority on International Law. Dr. Haroldo Valladão, an eminent Brazilian lawyer was the "official orator" for the Brazilian Bar Association who presented the award.

Jesse A. Miller

Jesse A. Miller of Des Moines, Iowa, long a prominent member of the Association and for many years active in its affairs, died August 26th as a result of an automobile accident. He was born August 8, 1869, on a farm in Johnson County, Iowa. He graduated from Iowa Law School in 1891 and immediately entered practice in Des Moines. He was county attorney of Polk County (1903-07) and district judge at Des Moines (1907-1910). He re-entered the practice of law in 1910 and continued in active practice until his death.

He was active in bar association work, locally and nationally. He was president of the Polk County Bar Association (1930) and of the Iowa State Bar Association (1921). A member of the American Bar Association from 1916 until his death, he served as a member of the General Council (1918-24), on the Executive Committee (1924-27) and the House of Delegates (1939-41).

He is survived by his three sons, Frederic M., Chief Justice of the Supreme Court of Iowa, Alexander M., a partner in his law firm, and J. Earle, claim superintendent for the Employers Mutual Casualty Company, Des Moines, Iowa.

His death will be mourned by his family and his loss will be felt by his many lawyer friends in and out of the Association.

THE ORGANIZED BAR AND NATIONAL DEFENSE*

By EDMUND RUFFIN BECKWITH
Chairman, ABA Committee on National Defense

OUR title expresses exactly the subject of our concern. When we say "work" we mean it, and not merely a readiness to work exhibited in pious resolutions or any other passive attitude. When we say, "the work of the Bar," we mean to distinguish between all the activities of lawyers individually and those which for this purpose lie within the peculiar competence of the organized *corps* of the legal profession. By "defense" we mean an active and effectual operation in the primary area, which in short is the morale of the people, and by "national" we intend to describe this nation and all the fundamental attributes which have made it strong and free.

* * *

The committee of the American Bar Association represents the whole country with one man from each Federal Judicial Circuit. Your state committee is one of forty-seven, and your local committees in the cities where there are Army or Navy camps or stations are representative of the hundreds of such organized units actively engaged in conformity with plans and methods of uniform design and scope. There are more than 600 members of the state committees, thousands on the local committees, and when account is taken of the Advisory Boards for Registrants it is certain that more than half, possibly two-thirds, of the 175,000-odd American lawyers are aligned with our enterprise. It is certain that no other group of citizens has ever voluntarily undertaken so extensive a public service or so effectively and systematically performed it.

* * *

Every lawyer is familiar with what we may call our incidental work. This comprises the drafting of special rules such as those required under the Soldiers' and Sailors' Civil Relief Act, and other continuing studies to improve procedure; the publication of such material, and for that matter the maintenance of the committees themselves which is entirely at the expense of the bar and in the aggregate a heavy charge; the conservation of the practice of lawyers going into the Services so as to protect both their clients' rights and their future occupations; and other things for which we have no time now.[1]

* * *

The immediate task last September was to make available for the great numbers of men going into the Armed Forces, and their families, whatever free legal assistance they might require. Two weeks after the Selective Service Act was passed this Committee had been appointed and uniform plans were being prepared for the state associations. At our request the Selective Service System amended the Regulations affecting the Advisory Boards so that they became in every county the nucleus of organization for the purpose There were also the existing legal aid societies and many local standing committees. Within two months this

*Notes for an address delivered at the Annual Meeting of the Virginia State Bar Association, White Sulphur Springs, W.Va., August 8, 1941.

1. See "Lawyers in Defense of Democracy, the Story of the American Bar Association's Committee on National Defense," a leaflet printed for the Committee on Ways and Means and obtainable upon request.

committee had compiled "A Manual of Law" and the Government Printing Office had turned out 200,000 copies most of which have long since been in the hands of draft board personnel and the committees of the bar. The Army and the Navy notified commanding officers, and cooperated with us in opening channels for quick transmittal of applications for assistance. The newspapers and the broadcasting companies were generous, and the people were quick to learn. I know of no exception to these two statements: that every request which has reached the bar has been promptly and skillfully attended to, and that the organization is entirely adequate to handle every appeal that may be made from anywhere in the country or in any territory or island possession or from any Naval vessel anywhere in the world.

* * *

Meanwhile our other great responsibility has been coming into clearer view than ever before. In the whole world today, in the hearts of men and women everywhere, there is one overmastering hope, one dreadful fear. This hope is for the preservation of human liberty, this fear is that men will not know enough and may not be brave enough to defend it successfully. All of us know these things, and so the question comes to mind, What has the organized bar to do with this?

In a general way the answer is as clear as anything could be. Hope and fear are not enough. There must be the will, and there can be no determined purpose without understanding and conviction. There must be courage, and there can be no courageous resolution unless men have faith that the ends for which they work and fight and perhaps must die deserve to survive for all time. These things are the heart of the morale of the people.

This nation does not arm itself to defend only its land, its trade or its possessions, nor could any race of slaves defend itself. What the country intends to defend is nothing more nor less than its way of life under its institutions of law and freedom. As to these, the bar is the ablest interpreter of their nature and the chief means of their administration in such manner that they may be worth preserving.

It is then the chief duty of the bar to be about this work, that the people may have faith in their laws and systems, faith in the administration of justice both in and out of the courts, faith in the wisdom and good conscience of their government, in its political processes, in its honest and vigorous devotion to the cause of individual freedom and the impartial protection of the rights of all.

* * *

There will come to the attention of every lawyer the practical situations, in the state and in the nation, to which these necessities apply. It is not for me to suggest to you in what detail you shall discharge your public duty, nor do you need to be reminded how for a thousand years the genius of freedom has worked out its arts and wisdom. But there is one thing I can say to you, with certainty and with high hope. As men of the law, professionally charged with protecting private rights, you do not stand alone when you take up in your organizations of the bar the preservation of public right and liberty. Everywhere throughout the country your brethren are standing with you. In every state and every locality men are working together, thinking along the same line, planning in the same way. As never before the bar is united in the service of the nation and of human freedom everywhere. We are not men of little faith, we are not weak and we are not afraid. We shall learn our duty, and in the cause of liberty and justice we shall do all that is required of us.

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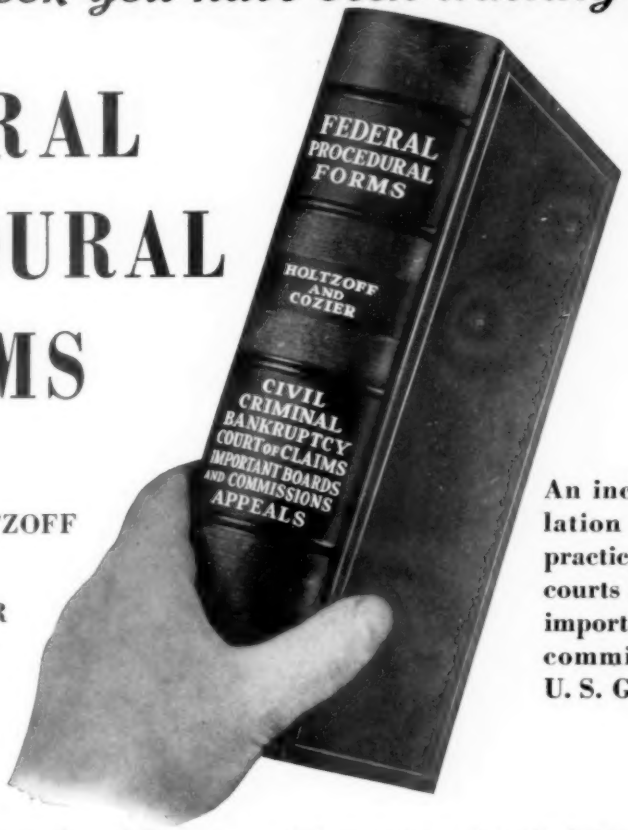

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